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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Balance Spa & Fitness, Inc.

Serial No. 78250125

Eugene E. Renz, Jr., Esq. for Balance Spa & Fitness, Inc.

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Before Hairston, Drost, and Bergsman, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On May 15, 2003, Balance Spa & Fitness, Inc.
(applicant) filed an application to register the mark
BALANCE SPA & FITNESS in typed or standard character form
on the Principal Register for services ultimately
identified as follows:

Health and fitness club services, namely providing
instruction and equipment in the field of physical
exercise in Class 41

Health spa services, namely cosmetic body care
services, massage services, beauty salon services in
Class 44.

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The application (Serial No. 78250125) is based on applicant's allegation of a bona fide intention to use the mark in commerce. Applicant has disclaimed the term "Spa & Fitness."

The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of the mark BALANCE A FITNESS STUDIO and design shown below that has been registered for "providing fitness and exercise facilities" in Class 41.



The registration (No. 2864824) issued on July 20, 2004 and the term "A Fitness Studio" has been disclaimed.

After the examining attorney made the refusal to register final, this appeal followed.¹

Initially, we must address the declaration and exhibits that applicant submitted with its appeal brief. The examining attorney has objected to this new evidence. Brief at unnumbered p. 11. We agree with the examining attorney's objection. As the USPTO's rules indicate, the

¹ Applicant filed, but subsequently withdrew, a request for an oral hearing in this case.

record on appeal should be complete prior to appeal. 37 CFR § 2.142(d). See also *In re First Draft Inc.*, 76 USPQ2d 1183, 1192 (TTAB 2005) ("Submission of the TARR printout with its appeal brief, however, is an untimely submission of this evidence"). Therefore, we will not consider any new evidence submitted with applicant's appeal brief.

Next, we address the issue of whether there is a likelihood of confusion in this case. We consider the evidence of record in light of the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003) and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

"The first *DuPont* factor requires examination of 'the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" *Palm Bay Imports Inc. v. Veuve*

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Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567.

Here, registrant's mark consists of the words BALANCE A FITNESS STUDIO with a design element. Applicant's mark consists of the words BALANCE SPA & FITNESS. Both marks contain the words BALANCE and FITNESS. They differ because applicant's mark includes the term "Spa &" while registrant's mark includes the phrase "A ... Studio." Because applicant's mark is in typed or standard character form, there is legally no difference between it and the stylization of the words in registrant's mark because we must assume that applicant's mark can be displayed in the same style as the registered mark (without the design element). *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party. Tomy asserts rights in SQUIRT SQUAD regardless of type styles, proportions, or other possible variations. Thus, apart from the background design, the displays must be considered the same"). Furthermore, the slight design in registrant's mark would

be unlikely to distinguish the marks. *In re Code Consultants Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (“[D]esign elements such as those appearing in applicant's mark [a dark square and a crosshair design] are generally less important than the word portion of the mark in creating an impression”). Registrant's circle and lines, which may be viewed as a highly stylized balance, would not significantly distinguish the marks. If the design is viewed as a balance, it merely reinforces the term BALANCE. If the design is viewed as a design with lines and a circle, these elements would serve to underline and highlight the term BALANCE, which is the only non-disclaimed word in the marks.

Both applicant and registrant have disclaimed most of the wording in the marks, “Spa & Fitness” and “A Fitness Studio.” The terms, “A Fitness Studio,” and “Spa & Fitness” have descriptive meanings for “fitness and exercise facilities,” “fitness club,” and “health spa” services. Disclaimed matter is often “less significant in creating the mark's commercial impression.” *Code Consultants*, 60 USPQ2d at 1702. See also *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) (“Regarding

descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion'"). While we do not ignore these terms, we hold that they would have less significance in determining whether the marks are similar. *M2 Software Inc. v. M2 Communications Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948-49 (Fed. Cir. 2006) ("When comparing the similarity of marks, a disclaimed term, here 'COMMUNICATIONS,' may be given little weight, but it may not be ignored"). Applicant argues that "the marks are quite different i.e. FITNESS vs. SPA for example." Brief at 3. However, even here, the disclaimed matter is actually somewhat similar: A FITNESS STUDIO and SPA & FITNESS. Therefore, applicant's argument that its services are "primarily in the SPA field aimed at beautification and FITNESS STUDIO is aimed at providing programs for improving strength and muscle" (Brief at 3) is not persuasive. The disclaimed wording in both marks emphasize that the services are in the field of "fitness."

The only word in the marks that is not disclaimed is the term "Balance." There is no indication that this term is a weak term for the services in this case and we find that it is the dominant feature of both marks. *National Data Corp.*, 224 USPQ at 751 ("[T]here is nothing improper

in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable"). Here, purchasers or users of health, fitness, or spa services are likely to rely on the first term "Balance" to distinguish the source of the services rather than the descriptive wording or registrant's design.

The marks BALANCE SPA & FITNESS and BALANCE A FITNESS STUDIO and design certainly have some differences but they also have similarities in sound and appearance because they contain the identical words "Balance" and Fitness" and applicant's mark can be displayed in the same style as registrant's. They have similar meanings because both refer to a facility identified by the term "BALANCE" where people can go for fitness-related services regardless of whether this place may be also described as a "studio" or a "spa."

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.

Baseball America Inc. v. Powerplay Sports Ltd., 71 USPQ2d 1844, 1848 (TTAB 2004).

Finally, the commercial impressions of the marks convey that these BALANCE services include fitness-related services. When we compare the marks in their entireties, we find that the terms are very similar. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (JOSE GASPAR GOLD and GASPAR'S ALE similar; the "Board had good reason to discount ALE, JOSE, and GOLD as significant differences between the marks").

Next, we address the question of whether the services of applicant and registrant are related. Applicant's services include "Health and fitness club services, namely providing instruction and equipment in the field of physical exercise." Registrant's services involve providing fitness and exercise facilities. Inasmuch as applicant's health and fitness club services include "providing ... equipment in the field of physical exercise," its services would overlap with registrant's fitness and exercise facilities. We must consider the services as they are described in the identification of services. *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the

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basis of the respective descriptions of goods [or services]"). When the goods or services overlap, marks do not have to be as similar before there is a likelihood of confusion. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines").

Applicant's services also include "Health spa services, namely cosmetic body care services, massage services, beauty salon services." The examining attorney has made of record several registrations to support her argument that these services are related. See Registration No. 2567948 ("health and fitness club services" and "spa services in the nature of a health spa and a beauty spa"); No. 2851355 ("health clubs" and "providing health spa services namely providing cosmetic body care services and sauna baths... and beauty salons"); No. 2835277 ("health and fitness club services" and "health spa services namely massage ... skin care salon services; cosmetic body care services..."); No. 2939408 ("health club services, namely providing instruction and equipment in the filed of physical exercise" and "health spa services featuring skin care salon services ... message therapy); and No. 2783051

("health and fitness clubs, health and fitness centers" and "health and fitness spas"). These registrations suggest that applicant's and registrant's types of services originate from the same source under a common mark. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source"). See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). Therefore, to the extent the services are not overlapping, they are related.

Furthermore, if the marks are used in association with the same services, their purchasers and channels of trade must be presumed to be the same. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the

goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). We add that the purchasers and channels of trade for spa services and the fitness services would be similar as they would appeal to people attempting to improve their physical appearance and health.

Applicant argues that the "consumers are professional buyers and are assumed to be sophisticated enough not [to] be confused by trademarks that are closely similar." Brief at 4. Even if purchasers here were sophisticated, this does not eliminate the likelihood of confusion particularly when the marks are as similar as they are in this case. *In re Hester Industries, Inc.*, 231 USPQ 881, 883 (TTAB 1986) ("While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products") and *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999) ("In any event, even careful purchasers are not immune from source confusion"). Secondly, we must consider the services as they are identified in the identification of goods and services. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). We do

not read limitations into the identification of services. In this case, neither applicant's or registrant's services contain any limitations. Therefore, we must assume that the health and fitness club services, health spa services, and fitness and exercise facilities services would be purchased by ordinary as well as sophisticated purchasers.² Even if there were evidence that indicated applicant and registrant currently limit their sales to professional purchasers, this fact would not limit the scope of the identification of services in the application or registration. *Octocom Systems*, 16 USPQ2d at 1787 ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). See also *Squirtco*, 216 USPQ at 940 ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts

² The evidence that applicant attached to its amendment dated May 16, 2005, supports the assumption that at least some of the users of applicant's and registrant's services are ordinary purchasers.

the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration").

Similarly, if there were evidence that was properly of record that established that applicant and registrant were actually operating in separate geographic areas, this fact would not overcome the likelihood of confusion refusal in this ex parte case. *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 77 (TTAB 1981) ("Now, the possible geographical separation between the parties, although the evidence does show an overlap on occasion, is of no significance in this proceeding because applicant is seeking territorially unrestricted registrations for its marks and, if granted, the presumptions afforded the registrations under Section 7(b) include a presumption of use or the right to use the registered marks throughout the United States thereby obviously covering opposer's area of use of its designation"). See also *Kay Corp. v. Weisfield's, Inc.*, 190 USPQ 565, 568 (TTAB 1976) (citations omitted):

[T]hese separate marketing areas and trade channels are of no moment in this proceeding because they are subject to change at any time and because there is no restriction on trade channels or geographical selling areas in either the application or in opposer's registration, and both would have to be restricted in order to establish a controlling separation of

customers and sales channels. Opposer's unrestricted incontestable registration is conclusive evidence of its exclusive right to use "ETERNALLY YOURS" for finger rings throughout the United States.

Therefore, when we consider that the marks are very similar and the services overlap or are related as well as the other factors, we conclude that confusion is likely.

Decision: The examining attorney's refusal to register applicant's mark on the ground that it is likely to cause confusion with the cited registered marks used in connection with the identified services under Section 2(d) of the Trademark Act is affirmed.