

**THIS OPINION  
IS NOT A PRECEDENT  
OF THE T.T.A.B.**

Mailed: January 11, 2007

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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Laurence Altshuler, M.D., P.C.

v.

Flanagan, Gail L.

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Opposition No. 91159782  
to application Serial No. 76511204  
filed on 5/2/03

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Mary M. Lee of Mary M. Lee, P.C. for Laurence Altshuler,  
M.D., P.C.

Brian T. Foley of McGovern & Associates for Gail L.  
Flanagan.

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Before Quinn, Rogers and Cataldo,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

On May 2, 2003, applicant, Gail L. Flanagan, an individual and United States citizen, filed an application to register on the Principal Register the mark displayed below, based upon an allegation of her use in commerce for "physical fitness instruction; physical fitness consultation services; personal exercise training; personal strength, endurance, flexibility and sports training and conditioning," in International Class 41; and "dietician

services; nutrition counseling; dietary planning and healthy eating consulting," in International Class 44.<sup>1</sup>



Registration has been opposed by Laurence Altshuler, M.D., P.C. ("opposer"). As grounds for opposition, opposer asserts that it is a corporation organized under the laws of Oklahoma; and that it is the owner of the mark BALANCED HEALING MEDICAL CENTER, previously used and registered in standard character form on the Principal Register, for the following goods and services,

pharmaceuticals, medicines and products used in conventional and alternative treatment modalities, namely herbal supplements, nutritional supplements, vitamins, and nutraceuticals, and phytochemicals for use as dietary and nutritional supplements,

in International Class 5;

pre-recorded video tapes featuring information on health and wellness and conventional and alternative treatment modalities, and pre-recorded audio tapes featuring information on health and wellness and conventional and alternative treatment modalities,

in International Class 9;

series of non-fiction books in the field of health and wellness and conventional and alternative

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<sup>1</sup> Application Serial No. 76511204 alleges April 11, 2003 as the date of first use of the mark anywhere and April 28, 2003 as the date of first use of the mark in commerce in connection with both classes of services. Applicant disclaims the exclusive right to use "HEALTH CENTER" apart from the mark as shown.

treatment modalities, newsletters concerning health and wellness and conventional and alternative treatment modalities, and pamphlets concerning health and wellness and conventional and alternative treatment modalities,

in International Class 16; and

medical services, namely, treatment in conventional and alternative medical protocols, and a medical clinic offering treatment in conventional and alternative medical protocols, and providing information in the field of health and wellness and conventional and alternative treatment modalities, including information about pharmaceuticals, medicines and products used in conventional and alternative treatment modalities, namely herbal supplements, nutritional supplements, vitamins, nutraceuticals, and phytochemicals, via the global computer network,

in International Class 42.<sup>2</sup> Opposer argues that it has used the mark BALANCED HEALING MEDICAL CENTER in connection with the above listed goods and services since at least as early as February 1998; that such use is prior to applicant's asserted first use of her involved mark; that applicant's mark, BALANCED HEALTH CENTER and design, when used on applicant's services so resembles opposer's mark BALANCED HEALING MEDICAL CENTER for its recited goods and services as to be likely to cause confusion, to cause mistake, and to deceive; and that opposer will be damaged thereby.

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<sup>2</sup> Registration No. 2469423 issued on July 17, 2001, with a disclaimer of "MEDICAL CENTER" apart from the mark as shown. The registration subsequently was corrected as to entity name on November 1, 2001. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

Applicant's answer consists of a general denial of the allegations in the notice of opposition.

**The Record**

The record in this case consists of the pleadings, the file of the involved application, and affidavits submitted by notice of reliance. In an interlocutory order, the Board approved the parties' January 26, 2005 stipulation to submit trial testimony by affidavit under cover of a notice of reliance, instead of in deposition form. See Trademark Rule 2.123(b). See also TBMP §705 (2d ed. rev. 2004). During its assigned testimony period, opposer filed the affidavit of Claudia Altshuler, Administrator of opposer, with opposer's notices of reliance upon the affidavit<sup>3</sup> and following exhibits:

(1) a photograph of the Balanced Healing Medical Center in Oklahoma City, Oklahoma;

(2) two status and title copies of opposer's Registration No. 2469423 for the mark BALANCED HEALING MEDICAL CENTER;

(3) a status and title copy of opposer's Registration No. 2449558 for its "circle inside a triangle" logo;

(4) a copy of the file contents including the prosecution history of the '423 Registration;

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<sup>3</sup> Exhibit Nos. 1, 3, and 5-24 are exhibits to the affidavit of Claudia Altshuler.

(5) a copy of opposer's current price list for its non-prescription products;

(6) printed copies of pages from opposer's Internet web site offering various non-prescription herbs, vitamins, supplements, audio and video tapes, and Dr. Laurence Altshuler's recently published book;

(7) printed copies of pages from opposer's Internet website describing the BALANCED HEALING MEDICAL CENTER, its mission, and the services it provides;

(8) a copy of the jacket of one of opposer's video tapes showing the BALANCED HEALING MEDICAL CENTER label;

(9) copies of the covers of several compact discs sold by opposer on various health and wellness topics such as weight loss, pain management, meditation and smoking cessation;

(10) a copy of opposer's patient billing sheet, including service items such as physical therapy, whirlpool, massage and therapeutic exercise;

(11) copies of opposer's newsletters covering a variety of health and wellness topics such as diet and exercise;

(12) printed copies of pages from opposer's Internet website listing the topics of lectures and articles written by Dr. Altshuler, such as "Food for Sports Performance" and "Vegetarianism Gets a Boost;"

(13) a copy of Dr. Altshuler's book, *BALANCED HEALING: Combining Modern Medicine with Safe and Effective Alternative Therapies*, published by Harbor Press in 2004<sup>4</sup>;

(14) a copy of one of opposer's promotional tri-fold brochures;

(15) a copy of one of opposer's yellow page advertisements;

(16) samples of newspaper advertisements run by opposer;

(17) a copy of Dr. Altshuler's tour schedule for promoting the above-noted *Balanced Healing* book;

(18) samples of national advertisements for the above-noted *Balanced Healing* book;

(19) a sample of the three-way folder used to make opposer's informational packets, and one of opposer's business cards;

(20) handouts on various topics typically included in opposer's informational packets;

(21) a sample of opposer's direct mail item;

(22) samples of opposer's stationery items;

(23) samples of published articles about Dr. Altshuler and the BALANCED HEALING MEDICAL CENTER;

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<sup>4</sup> It is noted that only the front cover of this exhibit is of record.

(24) samples of nationally published articles on health issues quoting Dr. Altshuler;

(25) applicant's responses to opposer's First Set of Requests to Applicant for Admissions;

(26) applicant's objections and responses to opposer's First Set of Interrogatories to Applicant;

(27) the file contents including the prosecution history of applicant's involved application Serial No. 76511204; and

(28) an excerpt from *The American Heritage Dictionary of the English Language* containing definitions of "healing" and "health."

The evidence of record offered by applicant consists of:

- (1) the trial testimony affidavit of applicant; and
- (2) a copy of the Notice of Publication of applicant's involved mark.

Opposer and applicant filed main briefs on the case, and opposer filed a reply brief.

#### **The Parties**

Opposer asserts that it adopted BALANCED HEALING MEDICAL CENTER in May 1997; that it began operating its medical clinic under the name BALANCED HEALING MEDICAL CENTER in February 1998; that at all times the clinic has been identified by the wording BALANCED HEALING MEDICAL CENTER and triangular logo; that BALANCED HEALING MEDICAL

CENTER is the subject of its above-noted Registration No. 2469423; and that the triangular logo, displayed below, is the subject of opposer's Registration No. 2449558, for substantially identical goods and services;<sup>5</sup>



that its goods and services are offered to the public at large; that opposer has substantial annual revenues and advertising expenditures under its BALANCED HEALING MEDICAL CENTER and logo marks; and that, as a result, opposer has received considerable media recognition. Opposer argues that applicant has admitted to opposer's prior use of its BALANCED HEALING MEDICAL CENTER mark; that the dominant portion of opposer's mark, i.e., BALANCED HEALING, is highly similar to BALANCED HEALTH, which is the dominant portion of applicant's mark; that applicant's design is insufficient to prevent confusion with opposer's mark; that in addition, opposer uses its mark in connection with a logo consisting of a circle within a triangle; that the design portion of applicant's mark thus is highly similar to opposer's registered logo; and that, as a result, the marks are confusingly similar. Opposer further argues that applicant's services are identical in part and otherwise

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<sup>5</sup> Registration No. 2449558 was issued on May 8, 2001.

related to opposer's goods and services; that applicant's customers comprise individuals of all ages and include athletes, individuals with eating disorders, and individuals in poor health requiring nutrition counseling as a result of disease; that, as a result, the parties' goods and services are marketed in the same channels of trade to common consumers; and that the classification of opposer's goods and services in different International Classes than applicant's services does not lessen the similarity between them. Opposer argues in addition that the parties' respective goods and services are neither sophisticated nor expensive; that opposer's BALANCED HEALING MEDICAL CENTER mark is a house mark that is used on a wide variety of goods and services; that opposer's mark is well-known; that any lack of actual confusion is not probative on the issue of likelihood of confusion; and that any doubt as to likelihood of confusion is to be resolved in the favor of opposer as prior registrant.

Applicant asserts that she began using the mark, BALANCED HEALTH CENTER and design, on April 28, 2003; that applicant was not aware of opposer or opposer's use of its mark until contacted by opposer's attorney; and that there have been no incidents of actual confusion between the parties' marks. Applicant argues that her mark differs substantially from that of opposer in appearance and sound;

and that the term "MEDICAL" is a dominant term in opposer's mark that does not appear in that of applicant. Applicant further argues that because she is not a physician, she cannot and does not provide medical services; and that her services are not sufficiently related to those of opposer to support a finding of likelihood of confusion. Applicant argues in addition that the services provided by the parties are expensive and purchased by sophisticated consumers; that opposer has not produced evidence that its mark is well-known in its field; and that the lack of actual confusion favors a finding of no likelihood of confusion.

Opposer argues in reply that applicant's good faith in adopting her mark is irrelevant to the question of likelihood of confusion with opposer's mark; that not all of applicant's or opposer's customers are sophisticated; and that some of the parties' customers are likely to experience confusion due to the similarities between the marks as well as the parties' goods and services.

**Opposer's Standing and Priority of Use**

Because opposer has properly made its pleaded registration of record, and further because opposer has asserted a likelihood of confusion claim that is not frivolous, we find that opposer has established its standing to oppose registration of applicant's mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir.

2000); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Moreover, because opposer's pleaded registration is of record, Section 2(d) priority is not an issue in this case as to the BALANCED HEATING MEDICAL CENTER mark and goods covered thereby.<sup>6</sup> See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

### **Likelihood of Confusion**

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

### **The Marks**

We turn to the first *du Pont* factor, i.e., whether applicant's mark and opposer's mark are similar or dissimilar when viewed in their entireties in terms of appearance, sound, connotation and overall commercial

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<sup>6</sup> We note in addition that applicant admitted that opposer made prior use of the goods listed in its pleaded registration in its response to opposer's admission request No. 4.

impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot, supra*. The test, under the first *du Pont* factor, 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 offered under the respective marks is likely to result. Because the involved goods and services would be marketed to the general public, our focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); and *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, we find that applicant's mark, BALANCED HEALTH CENTER and design, is highly similar to opposer's mark, BALANCED HEALING MEDICAL CENTER. Both marks begin and end with the identical terms "BALANCED" and "CENTER." In

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addition, the term "HEALTH" in applicant's mark is highly similar to the term "HEALING" in opposer's mark. As such, the wording BALANCED HEALING and CENTER in opposer's mark is nearly identical to the word portion of applicant's mark, that is, BALANCED HEALTH CENTER, in appearance, spelling and sound. Furthermore, both marks convey the sense of a center devoted to a balanced approach to health, healing and wellness. Thus, the marks convey highly similar connotations.

Contrary to applicant's assertion, we do not find that the disclaimed term "MEDICAL" is a dominant term in opposer's mark. Rather, the term "MEDICAL" clearly is generic as applied to opposer's medical services and otherwise lacks distinctiveness as applied to its remaining health, wellness and nutrition-related goods and services. As such, we do not find that the addition of the term "MEDICAL" to opposer's mark serves to create a commercial impression that is distinct from that of applicant's mark. Nor do we find that the presence of a design element in applicant's mark serves to create such a separate and distinct commercial impression from that of opposer's mark that confusion between them would be unlikely. It is settled that the literal portions are generally the dominant and most significant features of marks because consumers will call for the goods or services in the marketplace by

that portion. See *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *In re Drug Research Reports, Inc.*, 200 USPQ 554, 556 (TTAB 1978). For this reason, greater weight is often given to the literal portions of marks in determining whether there is a likelihood of confusion. See *Id.* Also, the circular design in applicant's mark is actually composed of two apparently equal arcs in balance, and the design therefore reinforces the term BALANCED. In addition, opposer has asserted and introduced evidence that it often uses its BALANCED HEALING MEDICAL CENTER mark in connection with the above-displayed "circle within a triangle" logo. Circles, triangles, and other common geometric shapes are not likely to be utilized by an average purchaser to distinguish goods or services. Finally, we note that applicant did not present any arguments or evidence regarding the relative strength of opposer's mark, either in terms of its suggestive nature as applied to the recited goods and services or whether third parties have made use of similar marks to identify related goods and services.

In view of the similarities between the marks in appearance, sound, meaning, connotation and overall commercial impression, this *du Pont* factor favors opposer.

### **The Goods and Services**

With respect to the goods and services, it is well established that the goods and services of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods and services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telephone Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods and services, but rather whether there is a likelihood of confusion as to the source thereof. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

We begin by observing that, as identified, opposer's goods and services all concern health, wellness, and conventional as well as alternative treatments intended to promote health and wellness. We note in particular that opposer's vitamins, dietary and nutritional supplements in Class 5 as well as its services of providing information

about vitamins, dietary and nutritional supplements in Class 42 appear on their face to be related to applicant's dietary and nutrition counseling, planning and consulting services in Class 44. In short, opposer's goods and services and applicant's services are concerned with diet and nutrition. In addition, opposer has introduced by notice of reliance a listing of goods upon which it has established use of its marks, whether sold per se or utilized in providing its services, that includes Chinese and Western herbs, topical solutions, vitamins and nutritional supplements, along with a brief description of the nutritional, dietary and health benefits associated therewith. This evidence further supports the relatedness of opposer's goods and services and applicant's services in Class 44. Opposer also has introduced evidence in the form of copies of its newsletter providing information on the subject of vitamins and dietary supplements used in connection with conventional medical treatments. This evidence provides further support for the relation between opposer's Class 42 services and applicant's services in Class 44.

With regard to applicant's physical fitness, exercise and personal training and conditioning services in Class 41, we note that opposer has introduced evidence by notice of reliance that it provides instructional videotapes on the subject of QiGong and Tai Chi exercises; informational

newsletters on the subject, *inter alia*, of the health benefits of exercise; and articles in periodical publications on the subject of the health benefits of Tai Chi exercise. This evidence provides support for the relation at least between opposer's Class 9 and 16 goods and applicant's Class 41 services.

In view of the related nature of opposer's goods and services and applicant's goods, this *du Pont* factor also favors opposer.

#### **Channels of Trade**

Because the evidence introduced by opposer establishes that the above goods and services are related, and because there are no recited restrictions as to their channels of trade or classes of purchasers, we must assume that the goods and services are available in all the normal channels of trade to all the usual purchasers for such goods and services, and that the channels of trade and the purchasers for opposer's goods and services as well as applicant's services would be the same. *See Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000). It is settled that in making our determination regarding the relatedness of the parties' goods and/or services, we must look to the goods and services as identified in the involved application and pleaded registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16

USPQ2d 1783, 1787 (Fed. Cir. 1990) ("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 *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 basis of the respective descriptions of goods.") As a result of the foregoing, we find that if these related goods and services are offered under similar marks there would be a likelihood of confusion. Thus, this *du Pont* factor also favors opposer.

#### **Conditions of Sale**

The next *du Pont* factor discussed by the parties is that of the conditions of sale. Applicant asserts that both its services and the goods and services of opposer are expensive, and would be purchased by careful and sophisticated users. However, opposer has made of record a copy of a price list for its Class 5, 9 and 16 goods indicating that they fall in the \$7 to \$62 price range. Thus, at least opposer's goods can be relatively inexpensive. Furthermore, sophisticated purchasers are not

necessarily knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988). In addition, there is no evidence that either applicant's services or opposer's goods and services would be purchased only by highly sophisticated persons. Indeed, the parties' respective health, wellness, fitness and nutritional goods and services appear to be available to anyone. Moreover, even if some degree of care were exhibited in making the purchasing decision, the marks BALANCED HEALING MEDICAL CENTER and BALANCED HEALTH CENTER and design are so similar that even careful purchasers are likely to assume that the marks identify goods and services emanating from a single source.

Thus, this *du Pont* factor also favors opposer.

#### **Fame of Opposer's Mark**

Another *du Pont* factor discussed by the parties is that of the fame of opposer's mark. Opposer asserts that its mark is well-known and, in support of this assertion, introduces evidence of its annual revenues and promotional expenditures under its registered mark. Applicant, for its part, argues that opposer has failed to introduce sufficient evidence that its mark is well-known in its field. We find that opposer's evidence, while establishing that opposer has been successful in marketing the goods and services under its mark, falls short of demonstrating that its BALANCED

HEALING MEDICAL CENTER mark is well-known for purposes of our likelihood of confusion analysis. Nonetheless, we do not find that opposer's failure to establish the fame of its mark lessens the likelihood of confusion between it and applicant's mark, given their similarities as well as the related nature of opposer's goods and services and applicant's services.

As such, we find this *du Pont* factor favors neither party.

#### **Actual Confusion**

The final *du Pont* factor discussed by the parties is the lack of instances of actual confusion. Applicant asserts that the absence of actual confusion suggests no likelihood of confusion. However, it is not necessary to show actual confusion in order to establish likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Moreover, on the record before us there is no evidence as to whether there has been any opportunity for confusion to occur. Thus, while an asserted lack of actual confusion slightly favors applicant, it is not sufficient to overcome the similarities between the parties' marks, their respective goods and/or services, and the commonality of the trade channels in which those goods and services are encountered.

**Summary**

In view of the foregoing, we find that opposer has established its standing to bring this proceeding; its priority of use; and that a likelihood of confusion exists between its BALANCED HEALING MEDICAL CENTER mark and applicant's BALANCED HEALTH CENTER and design mark, as used in connection with opposer's goods and services and applicant's services.

DECISION: The opposition is sustained, and registration to applicant is refused.