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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 Riotto

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Serial No. 85144408

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Michael J. Doherty of Doherty & Charney LLC, for Giancarlo Riotto.

Benjamin U. Okeke, Trademark Examining Attorney, Law Office 112 (Angela B. Wilson, Managing Attorney).

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Before Quinn, Cataldo, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Giancarlo Riotto ("applicant") filed an application to register the mark TRIUMPH FITNESS and design, as shown below for services identified as "personal fitness training services and consultancy; physical fitness studio services, namely, providing group exercise instruction, equipment, and facilities; providing fitness and exercise facilities," in International Class 41[1]:

[1] Serial No. 85144408, filed October 4, 2010, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging dates of first use and first use in commerce of April 27, 2006, and disclaiming the exclusive right to use the term "FITNESS" apart from the mark as shown. The application includes the following description: "The mark consists of an outlined shield with a very detailed eagle displayed on

The Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the registered mark TEAM TRIUMPH,[2] in standard character form, for "sports club services, namely providing athletic instruction and training, member social events, and providing a website featuring sports competition information," in International Class 41, that when used on or in connection with applicant's recited services, it is likely to cause

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it. The eagle displayed on the shield has its wings spread along with its tail shown. The shield has rivets going around the eagle as well. The words 'TRIUMPH FITNESS' appear above the top of the shield."

[2] Registration No. 3211266, issued February 20, 2007, and disclaiming the exclusive right to use the term "TEAM" apart from the mark as shown.

confusion or mistake or to deceive.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs, and applicant filed a reply brief. For the reasons discussed herein, the Board affirms the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

The Services and Channels of Trade

The recital of services in the application includes "personal fitness training services and consultancy; physical fitness studio services, namely, providing group exercise instruction, equipment, and facilities; providing fitness and exercise facilities," while the recital of services in the cited

registration includes "sports club services, namely providing athletic instruction and training, member social events, and providing a website featuring sports competition information." In analyzing their similarities and dissimilarities, we keep in mind that the test is not whether consumers would be likely to confuse the services, but rather would be likely to be confused into believing that they emanate from a single source. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished,* No. 92-1086 (Fed. Cir. June 5, 1992).

To show that consumers may expect to see services of the sort included in both the application and the cited registration offered under the same mark, the examining attorney submitted a number of use-based third party registrations that include services from both. Examples are Registration No. 3840051 ("athletic training services" and "providing fitness and exercise facilities"); Registration No. 3853213 ("athletic training services" and "consulting services in the fields of fitness and exercise"/"providing fitness and exercise facilities"); Registration No. 85039072 ("athletic training services" and "consulting services in the fields of fitness and exercise"/"providing fitness and exercise facilities"); Registration No. 3770777 ("athletic training services" and "personal training services"); Registration No. 3912576 ("athletic training services" and "personal fitness training services and consultancy"); Registration No. 85139352 ("athletic

training services" and "personal fitness training and consultancy"/"providing fitness and exercise facilities"); Registration No. 85173490 ("athletic training services" and "personal fitness training and consultancy"); Registration No. 3990096 ("athletic training services" and "personal fitness training services and consultancy"/"providing fitness and exercise facilities"). Copies of use-based, third-party registrations may serve to suggest that the services are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).[3] Accordingly, we find the services to be related and generally complementary.

Regarding channels of trade, we note that there are no limitations with regard thereto on the services in the cited registration, nor on those identified in the application. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983); *see also In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the services in the registration and the application move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services). Since the services are complementary, they

[3] The examining attorney also submitted web evidence to show the relatedness of the services. However, we find that only one of the websites, www.mysportsclubs.com, evidences services from both the application and the cited registration.

are likely to be purchased by the same consumers seeking similar results from physical training. Accordingly, we find that these *du Pont* factors weigh in favor of finding a likelihood of consumer confusion.

The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In comparing the marks, we are mindful that 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 so that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants, Inc. v. Morrison Inc.*, 23 USPQ2d at 1741. The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The mark in the cited registration consists of the words "TEAM TRIUMPH," in standard character form. The disclaimed term "team" appears to be descriptive of the services regarding "athletic training" and "sports competitions". *In re National*

Data Corp., 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985) (descriptive or disclaimed matter is generally considered a less dominant portion of a mark). When viewed in relation to the services in the cited registration, the mark creates the commercial impression of a triumphant or successful team of athletic trainers or else invites consumers to be part of the winning team by engaging in registrant's services.

Applicant's mark contains the words "TRIUMPH FITNESS," thereby sharing the term "triumph." The disclaimed term "fitness" appears to be descriptive of applicant's physical fitness services. When viewed in relation to the services in the application, the mark as a whole creates the commercial impression of services where consumers can triumph or win with applicant's fitness center and instruction.

Applicant's mark also contains, besides the literal portion, the design of an eagle. While we do not find the design in the application to be insignificant, it does not significantly change the commercial impression of the mark, nor would it affect its pronunciation, since consumers are likely to use the words to call for, or refer to, the services. *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983); *In re Dakin's Miniatures Inc.*, 59 UPSQ2d 1593, 1596 (TTAB 2001); *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

On the balance, we find the commercial impressions of the marks in their entireties to be similar and to outweigh dissimilarities in sight and sound, keeping in mind also that the mark in the cited registration is registered in standard

character format and may be displayed in any number of formats. *See Citigroup* Inc. *v. Capital City Bank Group Inc.*, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) ("If the registrant ... obtains a standard character mark without claim to 'any particular font style, size or color,' the registrant is entitled to depictions of the standard character mark regardless of font, style, size, or color."). Accordingly, we find this *du Pont* factor to also weigh in favor of finding a likelihood of consumer confusion.

Consumer Sophistication

Applicant urges us to consider the sophistication of its consumers. There is nothing in the record that would give us insight as to the possible sophistication of consumers of the relevant services. *See Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004) (the applicable standard of care is that of the least sophisticated consumer). Nor are the involved services of such a technical or specialized nature to suggest that they would be sought or utilized solely by sophisiticated consumers. To the contrary, the services appear to be available to anyone with an interest in fitness. To the extent they are marketed to the general public, as indicated by the record,[4] we must consider this *du Pont* factor to weigh in

[4] Applicant submitted some webpages regarding its business with its appeal brief. Although the examining attorney objected to these as having been submitted for the first time on appeal, there is at least one page of web evidence regarding applicant's own business that was submitted into the record during prosecution. Accordingly, we find the objection to be moot, as the relevant evidence is already of record.

favor of finding a likelihood of confusion.

Conclusion

In summary, we have carefully considered all of the evidence and arguments of record relevant to the pertinent *du Pont* likelihood of confusion factors. As our precedent dictates, we resolve doubt in favor of the prior registrant. *See In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). We conclude that with similar goods travelling in the same or similar channels of trade, and similar marks with similar commercial impressions, being marketed to ordinary purchasers who may be expected to exercise no more than ordinary care, there is a likelihood of confusion between applicant's TRIUMPH FITNESS and design mark for the applied-for services and the mark TEAM FITNESS as registered.

Decision: The refusal to register is affirmed.