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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 Elements Behavioral Health, Inc.*

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Serial No. 85375516

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Mark Andrew Goldstein of SoCal IP Law Group LLP for Elements Behavioral Health, Inc.

Leslie Richards, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow).

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Before Quinn, Kuhlke and Mermelstein, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Elements Behavioral Health, Inc., seeks registration on the Principal Register of the mark shown below for services identified as “counseling services in the fields of addiction and sobriety; consulting services regarding addiction treatment for patients; consulting services in the field of addiction treatment; drug and alcohol addiction treatment and rehabilitation services; rehabilitation of sexually addicted patients; drug and alcohol rehabilitation services; addiction treatment services; gambling addiction treatment services; rehabilitation of patients experiencing sex addiction and eating disorders, namely,

bulimia and anorexia; providing a web site featuring information in the field of addiction treatment and sobriety,” in International Class 44.



In response to the examining attorney’s request, applicant disclaimed the wording THE RANCH.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant’s mark, when used in connection with its identified services, so resembles the registered mark T.H.E RANCH (TEACHING HUMANS WITH EQUINE) (in standard characters) with the wording TEACHING HUMANS WITH EQUINE disclaimed, for services identified as “psychotherapy,” in International Class 44<sup>2</sup> as to be likely to cause confusion, mistake or deception.

When the question is likelihood of confusion, we analyze the facts as they relate to 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., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks

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<sup>1</sup> Application Serial No. 85375516, filed on July 19, 2011, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1(a), alleging first use and use in commerce on December 19, 2008. Hereinafter, referred to as “THE RANCH and design.”

<sup>2</sup> Registration No. 3730745, issued on December 29, 2009.

and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We begin with the *du Pont* factor of the relatedness of the services. We base our evaluation on the services as they are identified in the registration and application. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). The respective services need only be related in some manner or the conditions surrounding their marketing be such that they will be encountered by the same consumers under circumstances that would lead to the mistaken belief that the goods and/or services originate from the same source. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000).

The record shows that applicant's and registrant's identified services are related and the channels of trade and classes of consumers overlap. We first find that applicant's addiction treatment services are subsumed within registrant's identification of psychotherapy services, and, as such, are legally identical. The examining attorney submitted the following dictionary definitions to support this finding:

Psychotherapy: The treatment of mental and emotional disorders through the use of psychological techniques designed to encourage communication of conflicts and insight into problems, with the goal

being relief of symptoms, changes in behavior leading to improved social and vocational functioning, and personality growth;<sup>3</sup> and

Addiction: Addiction is a persistent, compulsive dependence on a behavior or substance. The term has been partially replaced by the word dependence for substance abuse. Addiction has been extended, however, to include mood-altering behaviors or activities.<sup>4</sup>

In addition, as shown in the excerpt from an online medical dictionary, one treatment for addiction is psychotherapy. See August 30, 2012 Office Action p. 5 <http://medical-dictionary.thefreedictionary.com/addiction> (“Treatment requires both medical and social approaches. Substance addicts may need hospital treatment to manage withdrawal symptoms. Individual or group psychotherapy is often helpful, but only after substance use has stopped. ... The most frequently recommended social form of outpatient treatment is the twelve-step program. Such programs are also frequently combined with psychotherapy.”) Applicant argues that “the typical understanding of psychotherapy is of an all-encompassing generalist [whereas] the specialized, directed narrow services recited by applicant differ from the generalized services in the cited registration.” App. Reply Br. p. 3. However, this statement implies what has been shown by the record, that the specific addiction treatment services are subsumed by the more general psychotherapy services.

Further, to the extent applicant’s therapy services are not legally identical to registrant’s services, the record establishes that they are closely related. The examining attorney submitted web pages from several third-party websites

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<sup>3</sup> <http://education.yahoo.com/reference/dictionary>, attached to the November 17, 2011 Office Action.

<sup>4</sup> <http://medical-dictionary.thefreedictionary.com/addiction>, attached to the August 30, 2012 Office Action.

providing psychotherapy and addiction treatment. See, e.g., <http://potomacpsychiatry.com> (“We provided psychotherapy ... drug use/abuse treatment ...”); [www.treatment4addiction.com](http://www.treatment4addiction.com) (“Psychotherapy may help patients with a number of issues ... addiction ... substance abuse”); and <http://moonviewsanctuary.com> (“...the psychotherapy that the recovering addict undergoes will play the most significant role in their treatment”).<sup>5</sup>

In addition, the record includes several third-party use-based registrations. See, e.g., Reg. No. 2648721 for the mark CENTER FOR CHANGE A PLACE FOR HOPE AND HEALING for “psychotherapy, medical treatment, nutritional counseling, and recreational therapy for women suffering from eating disorders”; Reg. No. 373056 for the mark VIRTUALLY BETTER for “psychotherapy services for the treatment of various anxiety and addiction disorders through virtual reality exposure treatment; Reg. No. 3328502 for a design mark for “addiction prevention and treatment services ... psychotherapy and psychological counseling for children, youth, and adults in individual, group, and family sessions; treatment and rehabilitation of alcohol, drug, and narcotic addicted patients”; Reg. No. 3556739 for the mark TEEN SOLUTIONS for “psychotherapy and psychotherapy counseling for children and adults in individual and family sessions; addiction treatment services”; Reg. No. 3681115 for the mark BODYIMAGERY for “psychotherapy, medical, and counseling services for addressing medical conditions, disorders, and behaviors”; Reg. No. 3911682 for the mark STONEWALL INSTITUTE for

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<sup>5</sup> All attached to the August 30, 2012 Office Action.

“addiction treatment services; psychotherapy services.”<sup>6</sup> We find these third-party registrations probative. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) (third-party registrations of marks for goods of the type listed by applicant and registrant may “serve to suggest that the listed goods and/or services are of a type which may emanate from a single source.”) Applicant’s submission of third-party registrations for addiction treatment without psychotherapy listed do not negate their probative value.

With regard to the channels of trade, because the services are legally identical or so closely related, and there are no limitations in the identifications of the application and cited registration, we must presume that they are offered in the same channels of trade to the same classes of customers. *Hewlett-Packard Co.*, 62 USPQ2d 1001.

We turn then to the *du Pont* factor of the similarities and dissimilarities between applicant’s mark THE RANCH and design, and registrant’s mark T.H.E RANCH (TEACHING HUMANS WITH EQUINE). We analyze “the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) *quoting du Pont*, 177 USPQ at 567. In making our determination we keep in mind that where the services are identical or virtually identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Further, when

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<sup>6</sup> All attached to the August 30, 2012 Office Action.

comparing the marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods and/or services offered under applicant's and registrant's marks is likely to result. *Midwestern Pet Foods, Inc., v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

In general, where the common element is merely descriptive, similarities may be outweighed by dissimilarities and, as noted above, applicant has disclaimed the wording THE RANCH in its mark, in view of the fact that the services are provided on a ranch. However, although applicant has disclaimed the wording THE RANCH, it is not removed from the mark for the purposes of comparing marks in a likelihood of confusion analysis. *Midwestern Pet Foods, Inc.*, 103 USPQ2d at 1440. Moreover, the wording "the ranch" is not disclaimed in registrant's mark; rather, it is the other wording "TEACHING HUMANS WITH EQUINE" that is disclaimed. Thus, T.H.E. RANCH portion of registrant's mark stands out from the modifying wording TEACHING HUMANS WITH EQUINE.

The marks are similar in terms of appearance, sound, connotation and commercial impression inasmuch as the entirety of the wording in applicant's mark is incorporated into and is the first part of registrant's standard character mark. *Palm Bay*, 73 USPQ2d at 1692; *Presto Prods., Inc., v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). We recognize that the additional words "teaching" "humans" and "equine" are not present in applicant's mark; however, the

first meaning of “the ranch” remains in registrant’s mark and as such the marks share the connotation “the ranch.” Further, even applicant’s mark THE RANCH would include equine or horses in its overall meaning. Ranch is defined as “An extensive farm, especially in the western United States, on which large herds of cattle, sheep, or horses are raised”<sup>7</sup> and “equine” is defined as “of, pertaining to, or resembling a horse.”<sup>8</sup>

The only distinctive element left to distinguish the marks would be applicant’s background ray design and wording typically dominates in terms of identification of source over designs in view of the fact that it is the wording by which potential consumers will call for the services.<sup>9</sup> *Viterra Inc.*, 101 USPQ2d at 1911; *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553 (TTAB 1987). Finally, applicant argues that the periods in the registrant’s mark create a different look: T.H.E. v. THE. As noted by the examining attorney, these periods do not alter the sound or commercial impression. We add that although the periods do add the impression of an abbreviation of the remaining wording they do not remove the meaning of the definite article THE.

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<sup>7</sup> <http://education.yahoo.com/reference/dictionary/entry/ranch>, attached November 17, 2011 Office Action.

<sup>8</sup> Random House Dictionary (2013) retrieved from [www.dictionary.com](http://www.dictionary.com). The Board may take judicial notice of dictionary definitions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006). See also *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>9</sup> Applicant’s stylization does not serve to distinguish the marks because the cited mark is registered in standard characters and, as such, is not limited to any particular display, but can be used in any stylization, including that similar to applicant’s mark. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011).



Ultimately, we find the similarities in appearance, sound, connotation and commercial impression of the wording THE RANCH outweigh the dissimilarities in the marks, particularly in view of the legally identical or very closely related services.

Applicant argues that “[b]ased on the use in commerce dates of the cited registration and the pending application, the marks have coexisted for more than four years [and] [d]uring this time Applicant has neither received notification of confusion from consumers nor received notification of confusion from the registration of the cited registration.” App. Br. p. 8.

Applicant’s argument that there have been no known instances of actual confusion is not persuasive. The contemporaneous use of applicant’s and registrant’s marks for a period of approximately four years without actual confusion is entitled to little weight. *See Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205 (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant’s corporate president’s unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965), especially in an ex parte context. In any event, there is not sufficient evidence relating to the extent of use of registrant’s marks and, thus, whether there have been meaningful

opportunities for instances of actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). The use date recited in the registration is not, standing alone, evidence of use and the fact that applicant has an online presence, as shown by the website excerpt submitted by the examining attorney, is not sufficient evidence to conclude that there have been meaningful opportunities for instances of actual confusion to have occurred. Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

In conclusion, we find that because the services are legally identical or otherwise closely related, the channels of trade and classes of consumers are the same, and the marks are similar, confusion is likely between applicant's THE RANCH and design mark and registrant's mark T.H.E. RANCH (TEACHING HUMANS WITH EQUINE). Finally, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

**Decision:** The refusal to register based on a likelihood of confusion under Section 2(d) of the Trademark Act is affirmed.