

From: Yontef, David

Sent: 10/16/2014 6:55:07 PM

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Subject: U.S. TRADEMARK APPLICATION NO. 85925162 - STAYFIT PLAN - HUMM 500006U - Request for  
Reconsideration Denied - Return to TTAB

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Attachment Information:

Count: 20

Files: X-Search Report.jpg, 77704764P001OF003.JPG, 77704764P002OF003.JPG,  
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HC2-1.jpg, HC2-2.jpg, 85925162.doc

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

|   |  |
|---|--|
| <b>U.S. APPLICATION SERIAL NO.</b> 85925162<br><br><b>MARK:</b> STAYFIT PLAN  |    |
| <b>CORRESPONDENT ADDRESS:</b><br>PATRICK R ROCHE<br><br>FAY SHARPE LLP<br><br>1228 EUCLID AVENUETHE HALLE BUILDING 5T<br><br>H FLOOR<br><br>CLEVELAND, OH 44115 | <b>GENERAL TRADEMARK INFORMATION:</b><br><br><a href="http://www.uspto.gov/trademarks/index.jsp">http://www.uspto.gov/trademarks/index.jsp</a><br><br><a href="#">VIEW YOUR APPLICATION FILE</a> |
| <b>APPLICANT:</b> QuickPayNet, Ltd  |  |
| <b>CORRESPONDENT'S REFERENCE/DOCKET NO:</b><br><br>HUMM 500006U<br><br><b>CORRESPONDENT E-MAIL ADDRESS:</b><br><br>proche@faysharpe.com                         |  |

**REQUEST FOR RECONSIDERATION DENIED**

**ISSUE/MAILING DATE:** 10/16/2014

This letter is further to the Examiner's Amendment mailed October 16, 2014.

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. See 37 C.F.R. §2.64(b); TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a).

The refusal under Trademark Act Section 2(d), 15 U.S.C. §1052(d) based on a likelihood of confusion with the registered marks STAY FIT SENIORS, STAY FIT SENIORS, STAYFIT and STAYFIT in U.S. Registration Nos. 3574131, 3776977, 4133936 and 4196636 made final in the Office action dated March 24, 2014 is maintained and continued to be final. See TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a).

In the present case, applicant's request has not resolved the outstanding issue, nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues.

Specifically, although applicant's request does not contain any new arguments regarding the similarity of the marks, applicant previously argued that confusion is unlikely because the common wording "STAY FIT" and "STAYFIT" is weak.

However, applicant's argument is speculative and unsupported by the evidence of record. In this regard, applicant merely stated "[it] has not taken the time or trouble to insert a table of all the existing registrations including STAYFIT as a formative."

In response to this comment, the examiner hereby attaches results from a search of the USPTO's X-Search database conducted October 16, 2014 showing only five properties containing the wording "STAY FIT" and "STAYFIT" in connection with medical and health services in International Classes 42 and 44; namely, the applied-for mark and four cited registrations. Therefore, contrary to applicant's position, the wording "STAY FIT" and "STAYFIT" are not weak in relation to the identified services.

Turning to the services of the parties, applicant posits that they are unrelated because "the [proposed] mark identifies a corporate fitness plan available to employees of a corporate subscriber to encourage those employees to enhance their health and well-being and thereby minimize health costs and insurance risks." Thus, according to applicant, confusion is unlikely because the services are different and travel through different channels of trade.

However, the services of the parties need not be identical or directly competitive to find a likelihood of confusion. See *Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, *they need only be related in some manner*, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the services come from a common source. [Emphasis added]. In *re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); see, e.g., *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Furthermore, the fact that the services of the parties *may* differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular services, but likelihood of confusion as to the source or sponsorship of those services. In *re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01.

In addition, with respect to applicant's and registrants' services, the question of likelihood of confusion is determined based on the description of the services stated in the application and registrations at issue, not on extrinsic evidence of actual use. See, e.g., *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-70, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Absent restrictions in an application and/or registration, the identified services are "presumed to travel in the same channels of trade to the same class of purchasers." In *re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Additionally, unrestricted and broad identifications are presumed to encompass all services of the type described. See *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

In this case, although applicant has amended the recitation of services, the identifications set forth in the registrations have no restrictions as to nature, type, channels of trade, or classes of purchasers. Moreover, applicant's identification continues to be unrestricted as to channels of trade and classes of purchasers. Therefore, it is presumed that these services travel in all normal channels of trade, and are available to the same class of purchasers.

Further, the application continues to use broad wording to describe the services and this wording is presumed to encompass all services of the type described including providing a subscription-based

website for young and old employees and motorists employed by corporate subscribers featuring information about health, wellness, chiropractic health and wellness and nutrition relating to diets, weight loss, diet planning, lifestyle wellness and assistance, fitness evaluation and consultation to help such employees make health, wellness and nutritional changes in their daily living to improve their overall health, which are undeniably commercially-related, *if not identical*, to the registrants' services.

Similarly, the registrations use broad wording to describe the services and this wording is presumed to encompass all services of the type described including providing a subscription-based website for employee motorists of corporate subscribers featuring information about health, wellness and nutrition relating to diets, weight loss, diet planning and lifestyle wellness for encouraging truck drivers and other drivers to enhance their health and well-being, minimize health costs and insurance risks and qualify for the best possible health insurance rates and healthcare wellness programs for elderly and older employees of corporate members to encourage such employees to live healthier lives while minimizing health costs and insurance risks and qualifying for low health insurance rates, which are undeniably commercially-related to applicant's services.

In this regard, applicant's attention is respectfully directed to the attached sample dictionary definitions showing the word "healthcare" means "the services that take care of people's health" and/or "the field concerned with the maintenance or restoration of the health of the body or mind". Therefore, inasmuch as the parties provide websites featuring information about health, wellness and nutrition and healthcare services under similar marks, consumers are likely to believe the services emanate from the same source and/or are sponsored or affiliated by the same company.

Material obtained from the Internet is generally accepted as competent evidence. *See In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-03 (TTAB 2009) (accepting Internet evidence to show relatedness of goods in a likelihood of confusion determination); TBMP §1208.03; TMEP §710.01(b).

Based on the foregoing remarks, applicant's request is denied.

The filing of a request for reconsideration does not extend the time for filing a proper response to a final Office action or an appeal with the Trademark Trial and Appeal Board (Board), which runs from the date the final Office action was issued/mailed. *See* 37 C.F.R. §2.64(b); TMEP §715.03, (a)(2)(B), (a)(2)(E), (c).

If time remains in the six-month response period to the final Office action, applicant has the remainder of the response period to comply with and/or overcome any outstanding final requirement(s) and/or refusal(s) and/or to file an appeal with the Board. TMEP §715.03(a)(2)(B), (c). However, if applicant has already filed a timely notice of appeal with the Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

## **Miscellaneous**

If applicant has questions about its application or needs further assistance, please telephone the assigned trademark examining attorney directly at the number below.

### **Advisory Regarding E-mail Communications**

If applicant has questions regarding this Office action, please telephone or e-mail the assigned trademark examining attorney. **All relevant e-mail communications will be placed in the official application record; however, an e-mail communication will not be accepted as a response to this Office action and will not extend the deadline for filing a proper response.** See 37 C.F.R. §2.191; TMEP §§709.04-.05. Further, although the trademark examining attorney may provide additional explanation pertaining to the refusal(s) and/or requirement(s) in this Office action, the trademark examining attorney may not provide legal advice or statements about applicant's rights. See TMEP §§705.02, 709.06.

/David Yontef/

Trademark Attorney Advisor

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healthcare Pronunciation /helθ ker/ ADJECTIVE

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**creep**  
used with other nouns to describe the unexpected and often unwanted effects of a particular situation or trend

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a woman in middle age who has to juggle caring for teenage children and ageing parents with a career

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someone who has to do a lot of boring and unpleasant work

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health-care

Pronunciation: (hēlth'kār), [key]

—n. Also **health'care**.

1. the field concerned with the maintenance or restoration of the health of the body or mind
2. any of the procedures or methods employed in this field

—adj. Also **health'-care**.  
of, pertaining to, or involved in healthcare; healthcare workers; a healthcare center.

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See also:

- healthcare (Thesaurus)

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