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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85925162 MARK: STAYFIT PLAN	
CORRESPONDENT ADDRESS: PATRICK R ROCHE FAY SHARPE LLP 1228 EUCLID AVENUETHE HALLE BUILDING 5T H FLOOR CLEVELAND, OH 44115	GENERAL TRADEMARK INFORMATION: http://www.uspto.gov/trademarks/index.jsp TTAB INFORMATION: http://www.uspto.gov/trademarks/process/appeal/index.jsp
APPLICANT: QuickPayNet, Ltd	
CORRESPONDENT'S REFERENCE/DOCKET NO: HUMM 500006U CORRESPONDENT E-MAIL ADDRESS: proche@faysharpe.com	

EXAMINING ATTORNEY'S APPEAL BRIEF

Index of Cited Cases

In re E.I. du Pont de Nemours & Co.,

476 F.2d 1357, 177 USPQ 563 (CCPA 1973)

In re National Novice Hockey League, Inc.,

222 USPQ 638 (TTAB 1984)

Stone Lion Capital Partners, LP v. Lion Capital LLP,

746 F.3d 1317, 1322, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014)

In re Nat'l Data Corp.,

753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985)

In re Viterra Inc.,

671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)

Presto Prods., Inc. v. Nice-Pak Prods., Inc.,

9 USPQ2d 1895, 1897 (TTAB 1988)

In re Dixie Rests., Inc.,

105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)

Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.,

526 F.2d 556, 557, 188 USPQ 105, 106 (C.C.P.A. 1975)

In re El Torito Rests., Inc.,

9 USPQ2d 2002, 2004 (TTAB 1988)

Wella Corp. v. Cal. Concept Corp.,

558 F.2d 1019, 1022, 194 USPQ 419, 422 (C.C.P.A. 1977)

Hunter Indus., Inc. v. Toro Co.,

110 USPQ2D 1651, 1660-61 (TTAB 2014)

Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce,

228 USPQ 689 (TTAB 1986),

aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987)

In re White Swan Ltd.,

8 USPQ2d 1534, 1535 (TTAB 1988)

In re 1st USA Realty Prof'ls, Inc.,

84 USPQ2d 1581, 1586

Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.,

685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012)

Edom Labs., Inc. v. Lichter,

102 USPQ2d 1546, 1551 (TTAB 2012)

L'Oreal S.A. v. Marcon,

102 USPQ2d 1434, 1438 (TTAB 2012)

Sealed Air Corp. v. Scott Paper Co.,

190 USPQ 106, 108 (TTAB 1975)

Shen Mfg. Co. v. Ritz Hotel Ltd.,

393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004)

On-line Careline Inc. v. Am. Online Inc.,

229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000)

Recot, Inc. v. Becton,

214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)

Coach Servs., Inc. v. Triumph Learning LLC,

668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)

7-Eleven Inc. v. Wechsler,

83 USPQ2d 1715, 1724 (TTAB 2007)

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)

Hewlett-Packard Co. v. Packard Press, Inc.,

281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)

In re Jump Designs, LLC,

80 USPQ2d 1370, 1374 (TTAB 2006)

In re Elbaum,

211 USPQ 639, 640 (TTAB 1981)

In re Davey Prods. Pty Ltd.,

92 USPQ2d 1198, 1202-03 (TTAB 2009)

In re Infinity Broad. Corp.,

60 USPQ2d 1214, 1217-18 (TTAB 2001)

In re Albert Trostel & Sons Co.,

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: QuickPayNet, Ltd BEFORE THE

Service mark: STAYFIT PLAN TRADEMARK TRIAL

Serial No.: 85925162 AND

Attorney: Patrick R. Roche, Esq. APPEAL BOARD

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the examining attorney's final refusal to register the service mark STAYFIT PLAN for "providing a subscription-based website for employees of insurance company subscribers featuring information about health, wellness and nutrition relating to diets, weight loss, diet planning, lifestyle wellness and assistance, fitness evaluation and consultation for corporate clients to help their employees make health, wellness and nutritional changes in their daily living to improve health" on the grounds that the mark, under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), is likely to be confused with the registered marks STAY FIT SENIORS and STAY FIT SENIORS both for, among other things, "chiropractic consultation

services”, “chiropractic and health care services”, “physical therapy” and “massage therapy” and STAYFIT and STAYFIT for “providing a website featuring information about health, wellness, nutrition and jogging and walking trails to truck drivers and other drivers” and “providing a website featuring information about health, wellness and nutrition to truck drivers and other drivers” that are the subjects of U.S. Registration Nos. 3574131, 3776977, 4133936 and 4196636, respectively.

FACTS

On May 7, 2013, Applicant applied to register the mark STAYFIT PLAN for a variety of health, wellness and nutritional services.¹ In the Office Action dated August 28, 2013, the examining attorney refused registration under Trademark Act Section 2(d) based on a likelihood of confusion with the registered marks STAY FIT SENIORS, STAY FIT SENIORS, STAYFIT and STAYFIT for “chiropractic consultation services”, “chiropractic and health care services”, “physical therapy”, “massage therapy”, “providing a website featuring information about health, wellness, nutrition and jogging and walking trails to truck drivers and other drivers” and “providing a website featuring information about health, wellness and nutrition to truck drivers and other drivers”.² The examining attorney made the refusal to register final in the Office Action dated March 24, 2014.

Applicant filed this appeal on September 24, 2014, and the case was forwarded to the examining attorney on December 22, 2014, for submission of his brief.

ARGUMENT

¹ Applicant subsequently amended the recitation of services to identify “providing a subscription-based website for employees of insurance company subscribers featuring information about health, wellness and nutrition relating to diets, weight loss, diet planning, lifestyle wellness and assistance, fitness evaluation and consultation for corporate clients to help their employees make health, wellness and nutritional changes in their daily living to improve health” in the Examiner’s Amendment issued October 16, 2014.

² The examining attorney also issued a refusal under Trademark Act Sections 1 and 45 based on different marks shown in the drawing and specimen and requirement to disclaim the word “PLAN”, which were withdrawn on March 24, 2014 based on Applicant’s response filed February 28, 2014.

I. THE MARKS OF THE APPLICANT AND REGISTRANTS ARE SIMILAR AND THE SERVICES ARE SO RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION UNDER SECTION 2(d) OF THE TRADEMARK ACT.

The Court in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), listed the principal factors to be considered in determining whether there is a likelihood of confusion under Section 2(d) of the Trademark Act. Any one of the factors listed may be dominant in any given case, depending upon the evidence of record. In this case, the following factors are the most relevant: similarity of the marks and the relationship between the services. The other factors cannot be considered because no relevant evidence concerning those factors is contained in the record. *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984).

In determining whether there is a likelihood of confusion, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. Similarity in any one of these elements alone is sufficient to find a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 177 USPQ at 567.

Applicant argues on pages five through six in its brief that the marks are readily distinguishable as to obviate a likelihood of confusion when viewed in their entireties. However, a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1322, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[I]n articulating reasons for reaching a conclusion on the issue of confusion, there 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.”)).

Furthermore, one feature of a mark may be more significant or dominant in creating a commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751; TMEP §1207.01(b)(viii), (c)(ii). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. *In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

In the present case, the wording “STAYFIT” in the applied-for mark is **identical and virtually identical** to the wording “STAY FIT” and “STAYFIT” in the registered marks. [Emphasis added]. This wording also

comprises the dominant portion of the marks as consumers are generally more inclined to focus on the first word, prefix or syllable in any service mark. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions).

Moreover, the words “STAYFIT” and “STAY FIT” are the dominant portions of the proposed mark and first two cited marks as the words “PLAN” and “SENIORS” are highly descriptive in relation to the services associated with the marks. As such, the respective marks create similar overall commercial impressions.

In addition, with regard to the registered marks STAY FIT SENIORS and STAY FIT SENIORS, although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *In re Viterro Inc.*, 671 F.3d at 1362, 101 USPQ2d at 1908; *In re Nat’l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751; TMEP §1207.01(b)(viii), (c)(ii). Disclaimed matter that is descriptive of or generic for a party’s services is typically less significant or less dominant when comparing marks. *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat’l Data Corp.*, 753 F.2d at 1060, 224 USPQ at 752; TMEP §1207.01(b)(viii), (c)(ii).

Therefore, inasmuch as Applicant correctly acknowledges on page five in its brief that “with respect to appearance and sound, the first component ‘STAYFIT’ is identical to . . . [the] registered marks”, the additional disclaimed words “PLAN” and “SENIORS” in the marks do not sufficiently obviate a likelihood of confusion.

Regarding the third and fourth cited registrations covering the marks STAYFIT and STAYFIT, Applicant merely added the word “PLAN” to the registered marks. However, adding this descriptive term to the registered marks does not obviate the similarity between the compared marks nor does it overcome a likelihood of confusion under Section 2(d). *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (C.C.P.A. 1975) (finding BENGAL and BENGAL LANCER and design confusingly similar); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (finding MACHO and MACHO COMBOS confusingly similar); TMEP §1207.01(b)(iii).

Moreover, incorporating the entirety of one mark within another does not overcome a likelihood of confusion under Section 2(d). *Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 1022, 194 USPQ 419, 422 (C.C.P.A. 1977) (finding CALIFORNIA CONCEPT and surfer design and CONCEPT confusingly similar);

Hunter Indus., Inc. v. Toro Co., 110 USPQ2D 1651, 1660-61 (TTAB 2014) (finding PRECISION and PRECISION DISTRIBUTION CONTROL confusingly similar); TMEP §1207.01(b)(iii). In the present case, the marks are identical in part.

Furthermore, with regard to the common terms “STAYFIT” and “STAY FIT” in the marks, marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both Applicant’s and Registrants’ marks. *Crocker Nat’l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff’d sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat’l Ass’n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); TMEP §1207.01(b)(ii)-(iii).

Similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. [Emphasis added]. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b)(iv).

In addition, when comparing 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 services offered under Applicant’s and Registrants’ marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012); TMEP §1207.01(b).

The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b). In this case, consumers will undoubtedly retain a similar general recollection of the marks; namely, STAYFIT, STAYFIT PLAN and STAY FIT SENIORS health services.

Applicant further posits on page five in its brief that “the first component ‘STAYFIT’ is identical to 29 registered marks”. This comment alludes to the notion that the term “STAYFIT” is weak, as argued by Applicant during the prosecution of the application.

Initially, the examining attorney notes that Applicant has never submitted any evidence establishing the alleged weakness of the term “STAYFIT”. In fact, Applicant’s response of February 28, 2014 stated that

“[it] has not taken the time or trouble to insert a table of all the existing registrations including STAYFIT as a formative.” Therefore, Applicant’s argument based on the alleged weakness of the term “STAYFIT” is speculative and unsupported by the evidence of record.

Notwithstanding these facts, the examining attorney’s Office Action dated October 16, 2014 contained results from a search of the USPTO’s X-Search database conducted on the same date 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.

What’s more, with regard to the marks, if the services of the respective parties are “similar in kind and/or closely related,” the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse services. *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b).

For the reasons set forth above, and inasmuch as the marks share the virtually identical terms “STAYFIT” and “STAY FIT” and would at the very least engender similar meanings as well as commercial impressions, source confusion is likely.

II. THE SERVICES ARE RELATED

Applicant argues on pages six through nine in its brief that confusion is unlikely because the services of the parties are not related and travel through different channels of trade. However, the services of the parties need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i).

The respective services need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356,

1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

Furthermore, the issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source or sponsorship of those goods. *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 this case, Applicant concedes on pages six and ten in its brief that “STAYFIT PLAN provides related services to those [registered] marks containing STAYFIT formatives” and “STAYFIT PLAN also suggests services related to those offered by registrants”. Therefore, inasmuch as the parties all render health, wellness and nutritional services, Applicant’s primary argument hinges on the trade channels associated with services of the parties.

In this regard, although Applicant emphasizes “common understanding of words or phrases used in identifications to determine the scope and nature of services offered [under marks]” on page eight in its brief, 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. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d at 1369-70, 101 USPQ2d at 1722.

Absent restrictions in an application and/or registrations, 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 at 1362, 101 USPQ2d at 1908 (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. *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)).

In this case, although Applicant amended the recitation of services, the identification continues to be unrestricted as to channels of trade and classes of purchasers. Moreover, the identifications set forth in the registrations have no restrictions as to nature, type, channels of trade or classes of purchasers.

Further, the application uses 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 elderly employees and drivers/motorists employed by corporate subscribers of insurance plans and

policies featuring information about health, wellness, chiropractic health and wellness and nutrition relating to diets, weight loss, diet planning, lifestyle wellness and assistance and 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. [Emphasis added].

Similarly, the registrations covering the marks STAYFIT and STAYFIT 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 drivers/motorists employed by corporate subscribers of insurance plans and policies featuring information about health, wellness and nutrition relating to diets, weight loss, diet planning, lifestyle wellness and for encouraging such employed drivers to enhance their health and well-being, minimize health costs and insurance risks and qualify for the best possible health insurance rates, which are commercially-related to Applicant's services.

Likewise, with regard to the "health care services" associated with the registered marks STAY FIT SENIORS and STAY FIT SENIORS, the registrations use broad wording to describe the services and this wording is presumed to encompass all services of the type described including those in Applicant's more narrow identification pertaining to elderly employees of corporate subscribers of insurance plans and policies.

In this regard, the sample dictionary definitions attached to the Office Action issued October 16, 2014 show 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 Applicant and the owner of the registered marks STAY FIT SENIORS and STAY FIT SENIORS provide 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. *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).

What's more, with regard to the "chiropractic consultation services", "chiropractic services", "physical therapy" and "massage therapy" covered by the registered marks STAY FIT SENIORS and STAY FIT SENIORS, the examining attorney's Office Action of August 28, 2013 contained sample printouts from

the USPTO X-Search database showing twenty-six third-party registrations of marks used in connection with the same or similar services as those of Applicant and Registrant. Applicant has never disputed this evidence. [Emphasis added].

Those printouts have probative value to the extent that they serve to suggest that the services listed therein, namely, health, wellness and nutrition services, chiropractic services, physical therapy services and/or massage therapy services and providing websites featuring information about health, wellness and nutrition, are of a kind that may emanate from a single source. *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); TMEP §1207.01(d)(iii). Thus, it is likely that consumers accustomed to seeing the Applicant's and Registrant's services sold under same or similar marks would be confused.

Finally, with regard to all four cited registrations, the overriding concern is not only to prevent buyer confusion as to the source of the services, but to protect the Registrants from adverse commercial impact due to use of a similar mark by a newcomer. *In re Shell Oil Co.*, 992 F.2d at 1208, 26 USPQ2d at 1690. Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the Registrants. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d at 1265, 62 USPQ2d at 1003; TMEP §1207.01(d)(i).

CONCLUSION

For the reasons set forth above, the refusal to register under Section 2(d) of the Trademark Act should be affirmed.

Respectfully submitted,

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