

<p>This Opinion is not a Precedent of the TTAB</p>
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Hearing: May 28, 2020

Mailed: June 30, 2020

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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*In re Jevona Battle*

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Serial No. 88029949

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Erik M. Pelton and Julie S. Shursky of Erik M. Pelton & Associates PLLC  
for Jevona Battle

Sarah E. Kunkleman, Trademark Examining Attorney, Law Office 105,  
Jennifer Williston, Managing Attorney.

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Before Cataldo, Heasley, and Dunn,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Jevona Battle, seeks registration on the Principal Register of the mark BATTLE FITNESS (in standard characters, with “FITNESS” disclaimed) for “Personal fitness training, physical fitness and physical exercise instruction, fitness and exercise classes” in International Class 41 and “Nutritional counseling” in International Class 44.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88029949 was filed on July 9, 2018, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere as of 2008, and use in commerce since at least as early as January 2011.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the following registered marks, issued to different entities:



(with "FITNESS" disclaimed) for:

"Fitness boot camps; Conducting fitness classes; Personal fitness training services; Personal fitness training services and consultancy; Physical fitness conditioning classes; Physical fitness instruction; Physical fitness studio services, namely, providing exercise classes, body sculpting classes, and group fitness classes; Physical fitness training of individuals and groups; Physical fitness training services" in International Class 41;<sup>2</sup> and



(with "FIT" disclaimed) for:

"Military physical fitness training services; outdoor physical fitness training services; team building services, namely, providing physical fitness training services for team building purposes; Conducting fitness classes; Conducting fitness classes within corporate offices, college facilities, health clubs, gyms, and for organized sports teams and for individuals; Physical fitness training services; Educational services, namely, providing correspondence courses and conducting classes and

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Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board's TTABVUE docket system.

<sup>2</sup> Registration No. 5140126, issued on the Principal Register on February 14, 2017. According to the description of the mark: The mark consists of the wording "Body Battle Fitness". The letter "A" in the word "Battle" is represented by a shield with a diagonal right-leaning line that runs across the shield. The upper left side of the shield, above the diagonal line, contains a person running towards the right side of the shield. The lower right side of the shield, below the diagonal line, contains a person running towards the left side of the shield. Color is not claimed as a feature of the mark.

workshops in the fields of fitness, health, and wellness” in International Class 41.<sup>3</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. We affirm the refusal to register.

### I. Likelihood of Confusion

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts of record. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). In making our determination, we have considered each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). *See Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). “In any likelihood of confusion

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<sup>3</sup> Registration No. 5257350 issued on August 1, 2016. According to the description of the mark: The mark consists of a gray rectangle in which appears a red military-style emblem in the shape of an inverted pentagon with three red chevrons forming the bottom, with the light gray wording “BATTLE” above the emblem and the light gray wording “FIT” inside the emblem. The colors gray, light gray, and red are claimed as a feature of the mark.

analysis, two key considerations are the similarities between the marks and the similarities between the goods and services.” *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004), *cited in Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, \*5 (TTAB 2019).

#### A. Relatedness of Services and Channels of Trade

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). A proper comparison “considers whether ‘the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 113 USPQ2d at 1086 (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)).

As the Examining Attorney establishes, Applicant’s and Registrants’ Class 41 services are legally identical. “Where the identification of services is broad, the Board ‘presume[s] that the services encompass all services of the type identified.’” *Southwestern Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015).” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, \* 4 (TTAB 2019). This includes services that are more narrowly identified.

Here, Applicant's broadly worded "Personal fitness training, physical fitness and physical exercise instruction, fitness and exercise classes" encompass Registrants' more narrowly described services:

Military physical fitness training services; outdoor physical fitness training services; team building services, namely, providing physical fitness training services for team building purposes; Conducting fitness classes; Conducting fitness classes within corporate offices, college facilities, health clubs, gyms, and for organized sports teams and for individuals; Physical fitness training services; Educational services, namely, providing correspondence courses and conducting classes and workshops in the fields of fitness, health, and wellness;<sup>4</sup>

and

Fitness boot camps; Conducting fitness classes; Personal fitness training services; Personal fitness training services and consultancy; Physical fitness conditioning classes; Physical fitness instruction; Physical fitness studio services, namely, providing exercise classes, body sculpting classes, and group fitness classes; Physical fitness training of individuals and groups; Physical fitness training services.<sup>5</sup>

Registrants' services in Class 41 are thus subsumed under Applicant's services, and legally identical thereto. *See In re Integrated Embedded*, 120 USPQ2d 1504, 1514 (TTAB 2016).

Furthermore, as the Examining Attorney correctly states, Applicant's Class 44 nutrition counseling services are closely related to the Class 41 fitness training services. "In determining whether the services are related, it is not necessary that the Applicant's services and Registrant's services be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes if the services are related in some manner or if the circumstances

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<sup>4</sup> Reg. No. 5257350 for BATTLE FIT and Design.

<sup>5</sup> Reg. No. 5140126 for BODY BATTLE FITNESS and Design.

surrounding marketing of these services are such that they could give rise to the mistaken belief that they originate from or are in some way associated with the same source.” *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1795 (TTAB 2017) (citing *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)). Evidence of relatedness may take the form of advertisements or use-based third-party registrations showing both services offered by the same business, under the same mark. *See In re Country Oven*, 2019 USPQ2d 443903 at \* 4-5.

The Examining Attorney furnishes both kinds of evidence. She adduces 15 third-party use-based registrations identifying both kinds of services under the same mark, including:

Registration No.	Mark	Pertinent Services
5226201	JAYFIT	Fitness boot camps; Conducting fitness classes  Nutrition counseling; consulting services in the fields of health and nutrition
5639874	UPFIT TRAINING ACADEMY	Personal training, semi-private instruction, group instruction, coaching and consultation in the fields of sports, exercise and fitness  Consultation in the fields of nutrition, health, and wellness
5712375	BAYCARE FITNESS CENTER	Physical fitness consultation; physical fitness training services  Counseling services in the fields of health, nutrition, and lifestyle wellness
5855658	OTM and Design	Personal fitness training services; physical fitness assessment services; physical fitness consultation  Dietary and nutritional counseling, healthcare services, namely, wellness programs
5716578	HELIX & GENE and Design	Personal fitness training services and consultancy  Nutrition counseling

Registration No.	Mark	Pertinent Services
5644894	STRONG ON!	Physical fitness instruction Nutrition counseling
5702652	CF-30	Conducting fitness classes; personal fitness training services; physical fitness instruction Consulting services in the fields of health and nutrition <sup>6</sup>

Third-party registrations of this sort serve to suggest that Applicant's and Registrants' services are of a type that may emanate from a single source. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6; *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, \*13 (TTAB 2020).

The Examining Attorney has also introduced printouts from eleven third-party websites showing the same entity furnishing fitness instruction services as well as nutrition counseling services to the general public under the same mark. For example:

- **Power And Balance Fitness**



<sup>6</sup> April 9, 2019 Office Action at 63-80; Sept. 24, 2019 Office Action at 10-34.

Power and Balance Fitness (PBF) is committed to health, fitness and proper nutrition.

Power and Balance Philosophy  
A\*W\*O\*L\* (A Way of Life)

✓ Results Driven

We offer on-site fitness and nutrition training for any fitness level. PBF is a partnership established on the principles of quality nutrition and proper training as A Way of Life. The PBF team has a combined 25 years of experience coaching nutrition and goal-specific training. We inspire all our clients to go A\*W\*O\*L\*. Make health and fitness A Way of Life.

- **Lift And Live Fitness**



### Private Fitness Training

Private training is ideal for men, women, seniors and teens of all fitness levels to: (1) Correct issues causing poor posture, joint pain, and imbalances, & ensuring safe & effective form on every rep. (2) Unleash your potential by pushing your body and mind to their limits & reap all the physical & mental benefits you can imagine.



### Group Fitness Training

This is WOMEN ONLY personal training in a small group of 4-12. Build a strong, flexible, balanced body as you transition through a variety of classes. The certified trainer leading the class will offer modifications to meet your fitness level and guide you to safe, effective form. Join us to shape your glutes and strengthen and flatten your core!



### Nutrition Training

No training is complete without the nutrition plan to go with it. Whether you have short term or long term fitness and health goals, whether you are single or have a family, we have the meal plan for you. Work with a nutritionist to learn how to at your way to a healthy, lean body with an approach that fits your lifestyle and goals.

[FREE Body Fat Assessment](#)

- **True FN**



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### Personal Training

For when you want to reach your goals.

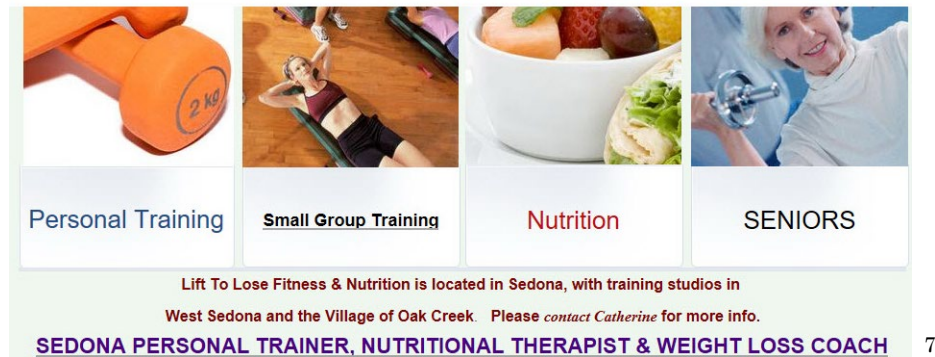


### Nutrition Counseling

Because you can't out-train a bad diet.



- **Sedona Personal Trainer**



This evidence, showing how the same entity commonly provides both kinds of services under the same mark, supports the Examining Attorney's position that Applicant's and Registrants' services are related for likelihood of confusion purposes. As the Court of Appeals for the Federal Circuit has declared, evidence that "a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis." *Hewlett-Packard Co. v. Packard Press*, 62 USPQ2d at 1004. See also *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

The Application and cited Registrations impose no restrictions on these legally identical and closely related services, which are presumed to travel in the same channels of trade to the same class of consumers, health-conscious members of the general public. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir.

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<sup>7</sup> PowerAndBalanceFitness.com, LiftAndLiveFitness.com, TrueFN.com, SedonaPersonalTrainer.com. See generally Oct. 29, 2018 Office Action at 13-20; April 9, 2019 Office Action at 34-62; Sept. 24, 2019 Office Action at 35-44.

2012) (quoting *Hewlett-Packard v. Packard Press*, 62 USPQ2d at 1005); *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1158 (TTAB 2018).

The Examining Attorney made all of these points regarding the relatedness of services and channels of trade in the course of examination and in her brief. Applicant has not responded to these points, either during prosecution or in her brief.<sup>8</sup>

The second and third *DuPont* factors thus weigh heavily in favor of a likelihood of confusion.

#### B. Similarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrants' marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1160. Because the services are legally identical or closely related, the degree of similarity between the marks necessary to find likelihood of confusion declines. *Bridgestone Americas Tire Operations LLC v. Federal Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1722; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1992).

Applicant argues that comparing her standard character mark, BATTLE

FITNESS ("FITNESS" disclaimed) with the registered composite marks



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<sup>8</sup> See Examining Attorney's brief, 10 TTABVUE 12 & n. 2.



(“FIT” disclaimed) and (“FITNESS” disclaimed) reveals more dissimilarity than similarity. “[E]ven if Applicant’s standard character BATTLE FITNESS mark could be depicted in any stylized fashion with respect to font style, size, or color, Applicant’s mark does not contain and cannot be perceived to contain any pictorial representation,”<sup>9</sup> Applicant contends, “Applicant’s mark contains neither a military-style emblem design nor a shield design with silhouettes of a man and woman running toward one another.”<sup>10</sup> If the marks are considered in their entirety, she contends, those distinctions make a difference.<sup>11</sup>

With respect to BATTLE FIT and design, Applicant argues:

“In the BATTLE FIT & Design Mark, the term ‘FIT’ is larger and boxed off in a red military-style emblem with three red chevrons forming the bottom, indicating that ‘FIT’ (although disclaimed) is a prominent term.”<sup>12</sup>

“The BATTLE FIT & Design Mark creates an association with the military by the red military-style emblem, and therefore the mark conveys that Registrant’s fitness training services and fitness classes use team building and military training techniques.”<sup>13</sup>

With respect to BODY BATTLE FITNESS and design, Applicant argues that the cited mark:

includes the additional term “BODY” at the beginning of the mark; this addition of “BODY” to the mark is likely to be impressed upon a purchaser or user of Registrant’s services because it is the first word that appears in

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<sup>9</sup> Applicant’s reply brief, 11 TTABVUE 7.

<sup>10</sup> Applicant’s brief, 8 TTABVUE 22.

<sup>11</sup> Applicant’s brief, 8 TTABVUE 21.

<sup>12</sup> Applicant’s brief 8 TTABVUE 22; *see also* Applicant’s reply brief, 11 TTABVUE 8.

<sup>13</sup> Applicant’s brief, 8 TTABVUE 23; *see also* Applicant’s reply brief, 11 TTABVUE 9.

the mark and is in a bolder, larger font, differentiating it from Applicant's BATTLE FITNESS mark.<sup>14</sup>

[T]he BODY BATTLE FITNESS & Design Mark suggests that Registrant's fitness classes involve fighting or combat against another individual in a manner that uses the whole body and incorporates fitness and conditioning exercises. Neither of the cited registrations create the impression of "BATTLE" referring to the surname of the owner [Jevona Battle].<sup>15</sup>

We agree with the Examining Attorney, though, that the marks are more similar than dissimilar. Because Applicant's mark, BATTLE FITNESS, is in standard characters, she could display it in the same font size, style, or color as the wording in Registrants' marks. Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a); *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) (registrant "entitled to depictions of the standard character mark regardless of font style, size, or color"). For example, she could display her mark emphasizing the word "FITNESS" as shown below:

BATTLE  
FITNESS

So FITNESS could be just as prominent in Applicant's mark as the word "FIT" in BATTLE FIT and design. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1090 (TTAB 2016). Furthermore, even though Applicant's standard character mark would not encompass Registrant's designs, *see In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181 (TTAB 2018), Applicant can—and indeed has—chosen military-style camouflage-colored lettering, as evidenced by her specimens of use:

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<sup>14</sup> Applicant's brief, 8 TTABVUE 22.

<sup>15</sup> Applicant's brief, 8 TTABVUE 23.



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So the wording and stylization of Applicant's mark can project the same military impression as either Registrant's mark. Moreover, the wording of the respective marks will tend to make a greater impression on purchasers than the accompanying designs, and will be remembered and used by them to request the services. *In re Viterra*, 101 USPQ2d at 1908, 1911.

Moreover, the marks incorporate one another's wording in their entirety. Applicant's BATTLE FITNESS mark incorporates the entirety of BATTLE FIT, leaving only one syllable difference in the marks' wording. Similarly, Applicant's BATTLE FITNESS mark is incorporated in its entirety in Registrant's BODY BATTLE FITNESS mark. Marks are often found to be confusingly similar when the one mark incorporates the other. *See, e.g., Coca-Cola Bottling Co. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL is similar to BENGAL LANCER); *In re Cosvetic Labs., Inc.*, 202 USPQ 842 (TTAB 1979) (applicant's mark HEAD START COSVETIC for vitamins for hair conditioners and shampoo is likely to cause confusion with HEAD START for men's hair lotion and after-shaving lotion).

The marks are deemed confusingly similar even if the first word in one of the incorporating marks differs from the other. *E.g., Wella Corp. v. California Concept*

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<sup>16</sup> March 19, 2019 specimens.

*Corp.*, 558 F.2d 1019, 194 USPQ 419 (CCPA 1977) (CALIFORNIA CONCEPT confusingly similar to CONCEPT); *Double Coin Holdings Ltd. v. Tru Development*, 2019 USPQ2d 377409, \* 7 (TTAB 2019) (ROAD WARRIOR contains entire mark WARRIOR). In this case, the first word “BODY” in BODY BATTLE FITNESS and design connotes the “body” that receives fitness training. All of the marks connote training the body to improve its fitness, so the additional word does not distinguish them.

Moreover, in this case, the overlapping marks retain the same structure, placing BATTLE before FIT or FITNESS. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (same word order and cadence in DETROIT ATHLETIC CO. and DETROIT ATHLETIC CLUB; “These similarities go a long way toward causing confusion among consumers.”).

The marks also convey the same meaning. As the Examining Attorney points out, “fit” and “fitness” carry the same connotation. “Fitness” is “the quality or state of being fit.”<sup>17</sup> To be “fit” also means “[h]aving the requisite qualities or skills to undertake something competently,” as in “*he felt himself ready for battle.*”<sup>18</sup> That sense suffuses all three marks in this case. In the context of fitness training and nutrition counseling, “battle fitness” connotes achieving a level of fitness: so fit one is ready for battle. Even if other connotations are possible, there is no reason to believe

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<sup>17</sup> Examining Attorney’s brief, 10 TTABVUE 8, citing Merriam-Webster.com, Sept. 24, 2019 Office Action at 4. *See also* AHDictionary.com: “fitness” – “the state or condition of being fit....” April 9, 2019 Office Action at 32.

<sup>18</sup> En.OxfordDictionaries.com, April 9, 2019 Office Action at 9-10.

that they would differ from mark to mark.

Even if Applicant intended a different, more personal connotation, referring to her surname, there is no reason to believe that consumers would perceive it that way. “[W]e must look to the likely consumer perception of the mark in connection with the identified goods [or services], rather than applicant’s intended connotation.” *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1886 (TTAB 2011).

For these reasons, the marks are more similar than dissimilar “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). In this case, all of the elements under the first *DuPont* factor weigh in favor of finding a likelihood of confusion.

C. The Strength or Weakness of the Word “BATTLE” in Registrants’ Marks

The strength of a mark, or a term in a mark, varies according its inherent strength, based on the nature of the term itself, and its commercial strength, based on the marketplace recognition value of the term as a mark. *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning)”) *cited in Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, \*8 (TTAB 2020). The strength of a mark “varies along a

spectrum from very strong to very weak.” *Palm Bay Imps.*, 73 USPQ2d at 1694 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

Applicant argues that the shared term “BATTLE” is conceptually and commercially weak. Its conceptual weakness inheres in its dictionary definition, she argues:

The term “BATTLE,” on its own, has little source identifying significance in the field of fitness because it is highly suggestive. “BATTLE” is defined as “to work very hard or struggle; strive; to force or accomplish by fighting, struggling, etc.” ... The term “BATTLE” in the cited marks, therefore, is relatively weak because it is highly suggestive that the fitness training involves a “fight” against the consumer’s current physical condition to accomplish the desired fitness goals, or that that consumer will have to “work very hard” to reach the desired fitness goals or complete particular physical exercises.<sup>19</sup>

...as well as its common use in articles about sports and physical fitness:

Further, the word “BATTLE” is conceptually weak due to its public overuse in the fitness industry to describe a given exercise as a “fight” or “competition.” The general public understands the term “BATTLE” in the fitness industry to mean a literal battle amongst two opponents (i.e. boxing battle), Applicant’s Office Action Response of Mar. 19, 2019, Exhibit B (“When we think of kickboxing, we think of tough guys and gals battling it out in the ring. We might think of the song Kung Fu Fighting. . .”) (emphasis added), or a battle against one’s own physical condition.<sup>20</sup>

Additionally, Applicant argues, widespread third-party registration and use of the term in connection with physical fitness training services has rendered it commercially weak and diluted, narrowing the registered BATTLE FIT and BODY


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<sup>19</sup> Applicant’s brief, 8 TTABVUE 15; Dictionary.com “Battle” March 19, 2019 Response to Office Action ex. A, at 32, 36.

<sup>20</sup> Applicant’s brief, 8 TTABVUE 15; articles on sports and fitness, March 19, 2019 Response to Office Action exs. B-J, at 32, 40-135.




BATTLE FITNESS marks' scope of protection.<sup>21</sup> Applicant introduced 23 third-party registrations to demonstrate that the term 'BATTLE' is weak and diluted for physical fitness and/or sports activities in Class 41.<sup>22</sup> For example:

Mark	Reg. No.	Pertinent Services
	4461144	Class 41: Providing fitness programs for students
BattleGroove	4368276	Class 41: Physical fitness conditioning classes
BATTLEHOUSE	5355758	Class 41: Fitness boot camps; Health club services, namely, providing instruction and equipment in the field of physical exercise; Personal fitness training services; Personal fitness training services and consultancy; Personal fitness training services featuring aerobic and anaerobic activities combined with resistance and flexibility training; Personal trainer services; Personal training services, namely, strength and conditioning training;
BattleKore	4712204	Class 41: Consulting services in the fields of fitness and exercise; Personal training provided in connection with weight loss and exercise programs; Physical fitness studio services, namely, providing group exercise instruction, equipment, and facilities; ....

<sup>21</sup> Applicant's brief, 8 TTABVUE 13, 15.

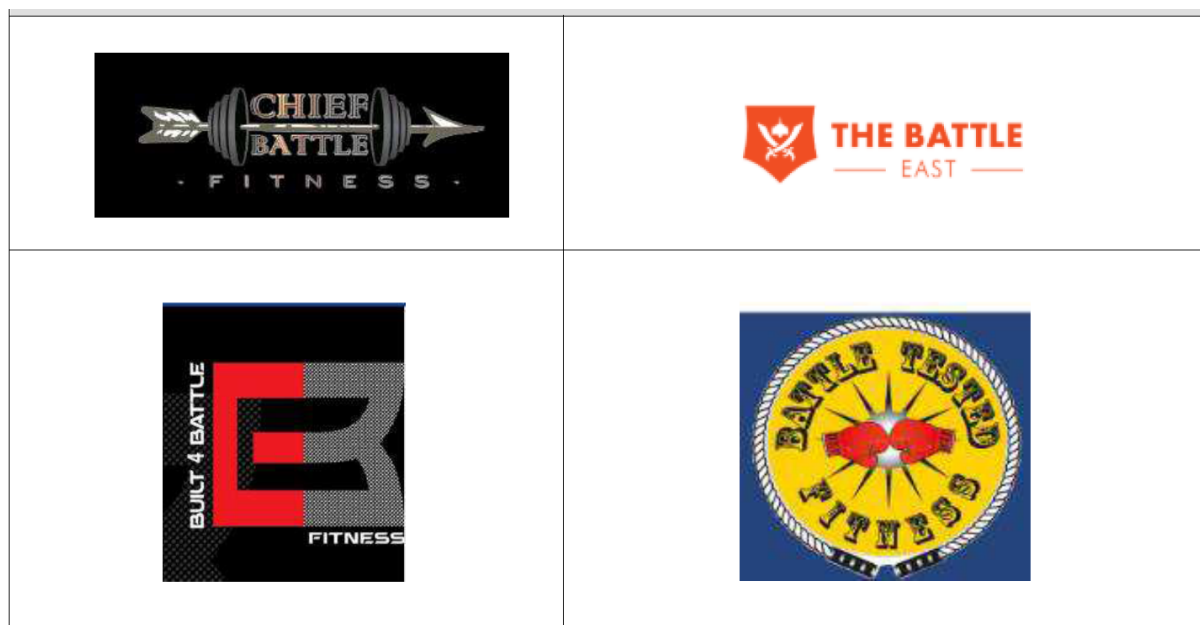
<sup>22</sup> Applicant's reply brief, 11 TTABVUE 5.

Mark	Reg. No.	Pertinent Services
	4900807	Class 41: Physical fitness training services
BATTLE MOM	5108377	Class 41: Providing a website featuring blogs and non-downloadable publications in the nature of blogs and articles in the field(s) of physical fitness, recreation, parenting, food, nutrition, recipes and healthy eating
SMALL BATTLES	4707952	Class 41: Education services, namely, mentoring in the field of health, wellness, and nutrition; Personal coaching services in the field of health, wellness, and nutrition
	5495163	Class 41: Sports training services
Battle Of The Gridiron	5406991	Class 41: Arranging and conducting athletic competitions
BATTLE X	4513266	Class 41: Organizing sporting events, namely, football, baseball, lacrosse, hockey, karate, soccer. Organizing sporting events, namely, football, baseball, lacrosse, hockey, karate, soccer
	4863060	Class 41: Organizing, arranging, and conducting sporting clays team events <sup>23</sup>

<sup>23</sup> Applicant's brief, 8 TTABVUE 18-20; March 19, 2019 Response to Office Action ex. K at 32, 136-161.

To show how these 23 third-party registered marks are in use, Applicant attached the specimens of use for each registered mark, and web pages showing most of the marks in use in commerce.<sup>24</sup>

Applicant also contends that “[t]he word ‘BATTLE’ is rather common in connection with various types of fitness training services. Applicant has provided website evidence of more than a dozen third parties in various geographic locations throughout the United States that use such marks with physical fitness training and personal fitness training services actively in the marketplace.”<sup>25</sup> For example:



<sup>24</sup> Sept. 3, 2019 response to Office Action (Request for Reconsideration) at 15-195.

<sup>25</sup> Applicant’s brief, 8 TTABVUE 16.

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Based on this evidence, Applicant concludes that “BATTLE” is so highly suggestive and so commonly used in connection with physical fitness or other sports activity services that the public will look to other elements or features of the marks to distinguish the source of the services.<sup>27</sup>

The sixth *DuPont* factor concerns “[t]he number and nature of similar marks in

<sup>26</sup> Applicant’s brief, 8 TTABVUE 16-17; *see* Applicant’s March 19, 2019 Response to Office Action exs. L-Z at 27-29, 162-240; Applicant’s Sept. 3, 2019 Response to Office Action (request for reconsideration) exs. BR-BU at 196-205.

<sup>27</sup> Applicant’s reply brief, 11 TTABVUE 5-7.

use on similar goods [or services].” *DuPont*, 177 USPQ at 567; *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016). Third parties’ registration and use of similar marks can bear on the strength or weakness of a registrant’s mark both commercially and conceptually.

First, if a mark, or an element of a mark, is used extensively in commerce by a number of third parties, that could undermine its commercial strength, as the consuming public may have become familiar with a multiplicity of the same or similar marks, and can distinguish them based on minor differences. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). “Evidence of third-party use of similar marks on similar goods [or services] is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps.*, 73 USPQ2d at 1693, *quoted in Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016). “The weaker [a registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation*, 115 USPQ2d at 1674.

Second, evidence that a mark, or an element of a mark, is commonly adopted by many different registrants may indicate that the common element has some significance that undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin*, 116 USPQ2d at 1136 (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally

understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak”) (quoting *Juice Generation*, 115 USPQ2d at 1674 (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015))).

Applying these principles to the case at hand, we find Applicant’s arguments and evidence unavailing, as they do not show that her BATTLE FITNESS mark should be entitled to register. If the common element of two or more marks—in this case, BATTLE—is inherently weak because it is highly suggestive of the services, that reduces the likelihood that consumers will be confused “unless the overall combinations have other commonality.” *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1676 (TTAB 2018).

In this case, the marks have another commonality: FITNESS. The mere fact that FITNESS and its counterpart FIT are disclaimed “does not give one license to simply ignore those words in the likelihood of confusion analysis. ‘This is so because confusion is evaluated from the perspective of the purchasing public, which is not aware that certain words or phrases have been disclaimed.’ ... Thus, the Board must consider the mark ‘in its entirety, including the disclaimed portion.’” *In re Detroit Athletic Co.*, 128 USPQ2d at 1050 (quoting *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1243 (Fed. Cir. 2004) and *Viterra*, 101 USPQ2d at 1911).


That commonality brings the applied-for and registered marks closer to one another. This was illustrated in *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742 (TTAB 2018) *aff’d* 777 Fed. Appx. 516 (Fed. Cir. 2019). There, the applicant owned a registration for the mark



for restaurant and bar services, with  
“RESTAURANT” disclaimed, and applied to register



for the same services, with  
“STEAKHOUSE” disclaimed. The examining attorney refused registration based on

likelihood of confusion with the registered mark , and  
the Board affirmed the refusal, finding:

In this appeal, Applicant’s applied-for mark — 5IVE STEAKHOUSE and design — **moves closer to the cited registration** — 5IVESTEAK and design — than the mark in Applicant’s prior registration — 5IVE RESTAURANT and design — rendering the new mark more similar in appearance, sound, and meaning to Registrant’s mark, which includes the word STEAK and does not include the word RESTAURANT. We acknowledge that STEAK, STEAKHOUSE, and RESTAURANT are generic (or at best descriptive) terms, but such terms, in appropriate circumstances, may—and here, do—contribute to the overall commercial impression created by a mark. *See Juice Generation v. GS Enters.*, 115 USPQ2d at 1676 (Board paid insufficient heed to the word JUICE in mark for juice bar services).

*Id.* at 1748 (emphasis added).

That commonality also distinguishes this case from *Juice Generation*. In *Juice Generation*, the applicant sought to register PEACE LOVE AND JUICE for juice bar

services, with JUICE disclaimed. Given the prevalent use of PEACE LOVE by third-party food service businesses, the Federal Circuit found that the added term JUICE distinguished the applicant's mark from the opposer's four registered marks incorporating the phrase PEACE & LOVE. *Juice Generation*, 115 USPQ2d at 1676. In the present case, though, Applicant's additional disclaimed term, FITNESS, is shared with the cited registered marks, in whole or in part. That would be like the applicant in *Juice Generation* applying to register PEACE LOVE alone, in standard characters. The commonality brings the marks closer together, as in *Inn at St. John's*. It does not distinguish Applicant's mark, as in *Juice Generation*.

In sum, we accord the registered BATTLE FITNESS and design and BODY BATTLE FITNESS and design marks the normal scope of protection to which suggestive marks are entitled. 15 U.S.C. § 1057(b). Even if consumers of fitness-related services are inured to the prevalence of "BATTLE" in the marketplace, Applicant's mark offers no additional distinguishing characteristics that would help consumers identify her mark as a single source and distinguish her services from those of others. Instead, she chooses the most common of terms, and uses them in standard characters, at that. Applicant's arguments and evidence under the sixth *DuPont* factor do not help her distinguish her mark from the cited registered marks.

## II. Conclusion

Registrants are entitled to protection from registration of Applicant's very similar mark for legally identical or closely related services. On consideration of all the evidence and arguments, we find a likelihood of confusion under Section 2(d).

**Decision:** The refusal to register Applicant's mark is affirmed.