

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rise Above

Serial No. 88735273


Rhett V. Barney of Lee & Hayes, P.C.
for Rise Above.

Mark Riso, Trademark Examining Attorney, Law Office 108,
Kathryn Coward, Managing Attorney.

Before Cataldo, Thurmon and Johnson,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Rise Above, filed an application to register on the Principal Register

the mark  **RISEABOVE** identifying the following services, as amended:

Charitable fundraising services for providing native youth with fitness and exercise programs designed to teach youth about the positive benefits of exercise, making healthy eating choices, and engaging in other health-promoting activities; Charitable fundraising services for providing native youth sports and physical programs for the purpose of teaching and developing within youth character enrichment and character awareness, in International Class 36; and

Charitable services, namely, providing basketball camps for native youth; Charitable services, namely, providing training in the field of basketball for native youth; Charitable services, namely, providing training in the fields of fitness and exercise designed to teach youth about the positive benefits of exercise, making healthy eating choices, and engaging in other health-promoting activities; Charitable services, namely, providing training in the fields of fitness and exercise for the purpose of providing character enrichment and character awareness among native youth, in International Class 41.¹

The Trademark Examining Attorney 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 four cited registered marks, owned by two entities:



RISE ABOVE² and RISE ABOVE COLORADO (standard characters, COLORADO disclaimed),³ both issued to Colorado Meth Project, Inc., identifying the following services:

charitable services, namely, promoting public awareness about the dangers of drugs by providing ongoing public service announcements;

¹ Application Serial No. 88735273 was filed on December 20, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserting August 2015 as a date of first use of the mark anywhere and in commerce in connection with both classes of services. The mark consists of the stylized wording "RISEABOVE" to the right of a stylized arrowhead. Color is not claimed as a feature of the mark.

² Registration No. 4861764 issued on December 1, 2015. Section 8 affidavit accepted; Section 15 affidavit acknowledged. The mark consists of a thick semi-circle over one large triangle and one small triangle which overlap to create the appearance of mountains above the words "RISE ABOVE."

³ Registration No. 4861763 issued on December 1, 2015. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

production of public service announcements in the field of drug prevention and drug awareness; providing business networking opportunities for youth leadership and advocacy in the area of drug prevention; providing career networking opportunities for youth leadership and advocacy in the area of drug prevention, in International Class 35; and

educational services, namely, classes, seminars, workshops, online resource guides and lesson plans for teachers, community leaders, and young people in the area of drug prevention and drug awareness; opportunities for youth leadership and advocacy in the area of drug prevention, namely, providing information on-line relating to educational opportunities in the field of drug prevention and drug awareness, in International Class 41; and

RISE ABOVE FITNESS (in standard characters, FITNESS disclaimed),⁴ and RISE ABOVE (in standard characters),⁵ both issued to Rise Above Fitness, LLC, identifying the following services:

Fitness boot camps; Health club services, namely, providing instruction and equipment in the field of physical exercise; Instruction in the field of physical fitness; Membership club services, namely, providing training to members in the field of physical fitness; Personal fitness training services; Personal fitness training services and consultancy; Personal trainer services; Personal training services, namely, strength and conditioning training and speed training; Personal training services, namely, strength and conditioning training; Physical fitness instruction; Physical fitness training of individuals and groups; Providing fitness and exercise facilities, in International Class 41.⁶

After the Trademark Examining Attorney made final the refusal to register, Applicant appealed to this Board.⁷ The appeal is fully briefed. We affirm the refusal

⁴ Reg. No. 6219201 issued on the Principal Register on December 15, 2020.

⁵ Reg. No. 6830021 issued on the Principal Register on August 30, 2022.

⁶ The otherwise identical services are presented in slightly different order in these two registrations.

⁷ All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket

to register as discussed below.

I. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

In making our determination, we consider each relevant *DuPont* factor for which there is evidence and argument, See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019), and have treated other factors as neutral. See *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.”)); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. See, e.g., *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020). In this case, Applicant’s brief and reply brief are located at 8 TTABVUE and 11 TTABVUE. The Examining Attorney’s brief is located at 10 TTABVUE.

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. 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) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Two key considerations are the similarities between the marks and the relatedness of 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.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

A. Focus on Reg. No. 6830021⁸

For purposes of our likelihood of confusion analysis, we will focus on cited Reg. No. 6830021 for the mark RISE ABOVE (in standard characters) identifying

Fitness boot camps; Health club services, namely, providing instruction and equipment in the field of physical exercise; Instruction in the field of physical fitness; Membership club services, namely, providing training to members in the field of physical fitness; Personal fitness training services; Personal fitness training services and consultancy; Personal trainer services; Personal training services, namely, strength and conditioning training and speed training; Personal training services, namely, strength and conditioning training; Physical fitness instruction; Physical fitness training of individuals and groups; Providing fitness and exercise facilities, in International Class 41.

⁸ Hereinafter usually referred to as “cited registration.”

In our view, this registration, coupled with the foregoing relevant identified services, is most likely to support the likelihood of confusion refusal. If likelihood of confusion is found with regard to this registration, then consideration of others would be unnecessary; and if not, then consideration of other less relevant registrations would not produce a different result. *See, e.g., N. Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1225 (TTAB 2015) (citing *In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010)) (“[I]f there is no likelihood of confusion between applicant’s mark and MAX in typed form, then there would be no likelihood of confusion with the MAX and dot design mark.”).

B. Strength of the Cited Mark / Number and Nature of Similar Marks

In determining the strength of the cited RISE ABOVE mark, we consider both its inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *See 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”). “[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted).

“The weaker [the 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.” *Id.* at 1676 (internal citations omitted).

See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 369 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”).

The fifth *DuPont* factor, the fame of the prior mark, and the sixth *DuPont* factor, the number and nature of similar marks in use for similar goods or services, may be considered in tandem to determine the strength of the cited mark and the scope of protection to which it is entitled.⁹ *See DuPont*, 177 USPQ at 567; *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017).

Additionally, the Federal Circuit has held that if there is evidence a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate the common element has some non-source identifying significance that undermines its conceptual and commercial strength as an indicator of a single source. *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) (“[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

⁹ Because the owner of the cited registration is not a party to this appeal, and further because the Examining Attorney is under no obligation to demonstrate the fame of the cited mark, we find the fifth *DuPont* factor to be neutral. *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006) (fame of the mark in a cited registration is not normally a factor in ex parte proceedings.).

meaning, leading to the conclusion that that segment is relatively weak”) (quoting *Juice Generation*, 115 USPQ2d at 1674).

Turning first to conceptual strength or weakness, we note that the cited registration for the RISE ABOVE mark issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. Accordingly, because no challenge to the lack of inherent distinctiveness of the cited mark has been lodged by Applicant, we find the cited RISE ABOVE mark is inherently distinctive and, therefore, it should be entitled to the normal scope of protection accorded inherently distinctive marks. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods”).

At pages 79-93 of the September 21, 2020 Office action response, Applicant submitted copies of two live third-party registrations (and three subsequently expired registrations) for RISE-formative marks identifying a variety of goods and services, summarized below.




Reg. No. 5839715 for the mark ,¹⁰ identifying

Charitable services, namely, organizing and conducting volunteer programs and community service projects in International Class 35;

Educational services, namely, providing classes, workshops, internships, programs and exhibitions in the field of emergency preparedness, environmental issues, marine science, health, wellness, cultural arts, transportation equity, science, sustainability, civic engagement, hydroponics, gardening, and community development and distribution of course and educational materials in connection therewith; Summer camps in International Class 41;

Providing a community center for community-based programs, cultural activities, and art exhibitions in International Class 43;



Reg. No. 5216991 for the mark ,¹¹ identifying “Charitable services, namely, organizing youth groups to undertake projects to benefit the needy and the community to encourage leadership, character, compassion, and good citizenship,” in International Class 35;

¹⁰ The mark consists of the stylized text “RISE” with a profile of a bird perched on top of the letter “I” facing to the right. Color is not claimed as a feature of the mark.

¹¹ The mark consists of “RISE UP FOR YOUTH” in orange, displayed in a stacked formation with the word “RISE” at the top with an orange circle filled with various shades of yellow swirls dotting the letter “I”. The words “UP FOR” are centered directly under the word “RISE”. The word “YOUTH” is centered directly under the words “UP FOR”. The color white in the mark is merely background and is not claimed as a feature of the mark. The color(s) orange and yellow is/are claimed as a feature of the mark.

This registration subsequently was cancelled under Section 8.

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Reg. No. 5108978 for the mark RIZEUP (in standard characters), identifying “Crowdfunding services in the nature of providing financing from money collected from individuals; Crowdfunding services in the nature of accepting and administering monetary contributions from a group of individuals; Charitable fundraising services; profit sharing,” in International Class 36;¹²



Reg. No. 5410503 for the mark NETWORK (NETWORK disclaimed), identifying

Downloadable electronic publications, instructional resources and toolkits in the nature of slide presentations, data analyses, flyers for educator and student programming, data protocols, simulation modules, professional learning exercises, educator team activities and note-taking documents, and facilitation guides, for use by teachers, school administrators, district leaders, and other educational professionals for the purpose of designing and implementing educational programs to enhance data practices and improve student outcomes in International Class 9;

Philanthropic and charitable services, namely, fundraising activity, in the nature of facilitating grants for third-parties in the field of education in International Class 36;

Educational services, namely, providing technical instruction to schools and school districts in the design and implementation of programs used to strengthen data systems and improve student outcomes; Educational services, namely, conducting training seminars, workshops, retreats, networking events and conferences for teachers, school administrators, district leaders, and other educational professionals for the purpose of sharing ideas and facilitating collaboration to advance student


¹² This registration subsequently was cancelled under Section 8.

achievement; Providing a website featuring topics related to education for students in International Class 41;

Software as a service (SAAS) services, namely, featuring software for the provision of online access to a secure, password-protected data dashboard allowing educators to provide personalized and timely support to advance student outcomes in International Class 42; and

Reg. No. 5069472 for the mark RISE TO THRIVE, identifying “charitable fundraising” in International Class 36.¹³

We note that of the five third-party registrations of record, none are for the mark

RISE ABOVE. Only one – Reg. No. 5839715 for the mark  – identifies services related to those identified by the registrant in the present case, namely education in the field of health and wellness. The remaining four third-party registrations for RISE-formative marks identify goods and services for which Applicant has not established a similarity with the services of the registrant. These four registrations possess little, if any, relevance bearing on the weakness of the registered RISE ABOVE mark. *See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, llc*, 123 USPQ2d at 1751 (disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination

¹³ This registration subsequently was cancelled under Section 8.

that the existence of I AM marks for goods in other classes, ... support a finding that registrants' marks are weak with respect to the goods identified in their registrations").


Further, at pages 30-77 of its March 14, 2022 non-final Office action response, Applicant submitted screenshots from third-party websites showing use of RISE ABOVE and formatives thereof in relation to addiction, substance abuse, anger management and domestic violence programs. However, none relate to the health clubs, fitness or exercise services identified in the cited registration.¹⁴ Thus, Applicant's evidence of third-party uses is not probative of the relative strength of the RISE ABOVE mark in the cited registration. *Cf.*, *Juice Generation*, 115 USPQ2d at 1674-75; *Wolfskin*, 116 USPQ2d at 1135-36.

Viewing the record as a whole, we find that the registered RISE ABOVE mark is entitled to the usual scope of protection to which inherently distinctive marks are entitled, primarily due to the lack of evidence of any descriptive significance of the terms comprising the mark and the very modest evidence of third-party registration of RISE-formatives for largely unrelated goods and services. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak).

¹⁴ This evidence appears to be directed to the two registrations owned by Colorado Meth Project, Inc., that we are not considering in our determination.

C. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's mark and the registered mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay*, 73 USPQ2d at 1692.

As for the marks RISE ABOVE and , they are more similar than dissimilar “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay* 73 USPQ2d at 1692, (quoting *du Pont*, 177 USPQ at 567). This is because the literal and dominant portion of Applicant's mark is legally identical to the registrant's mark. In fact, it is settled that where, as here, a mark is comprised of both words and a design, the words are normally accorded greater weight, in part because consumers are likely to remember and use the word(s) to request the goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) (“the verbal portion of a word and design mark likely will be the dominant portion”); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant's mark shares with registrant's mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”).

We find that this general principle is applicable here. In Applicant's



mark, RISEABOVE is the only literal element, and prominently appears to the right of the arrowhead design. The stylized arrowhead design, while also distinctive, appears as an abstract triangle to those who do not perceive it as an arrowhead. In addition, the triangular arrowhead points upward, reinforcing and drawing additional attention to the wording RISEABOVE. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1138 (TTAB 2015). Those interested in Applicant's services would rely on the wording RISEABOVE rather than the design.


The registered RISE ABOVE mark is identical to the literal element of Applicant's mark. The presence or absence of a space between the two words RISE and ABOVE is an inconsequential difference that even if consumers noticed or remembered would not serve to distinguish these marks. *In re Iolo Technologies, LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010) (finding ACTIVECARE and ACTIVE CARE are similar); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009) (finding that petitioner's mark DESIGNED2SELL is phonetically identical to respondent's mark DESIGNED TO SELL.). The marks are also identical in sound inasmuch as their wording is identical. The marks' connotations are also essentially identical inasmuch as both exhort consumers of the respective services to rise above their current conditions and to excel.

Applicant argues:

because of the underlying goods and services targeting Native American consumers, the inclusion of Applicant’s “arrowhead” assists not only to distinguish Applicant’s services from others using similar marks but also alters the commercial impression of the mark.

Applicant’s brief at 10.

However, the Examining Attorney has argued and introduced evidence (e.g., April 19, 2023 final Office action at 18-21) that arrowheads are not only associated with Native Americans, but also with numerous classical and ancient cultures as well as contemporary archery enthusiasts. Indeed, the highly stylized arrowhead in

Applicant’s  mark does not particularly evoke Native American culture or identity. Consumers familiar with the registrant’s mark who make the association may, upon encountering Applicant’s mark, believe that Applicant is an entity related to or sponsored by the registrant providing services to Native American youth, but nonetheless pointing to a common source. Overall, the marks are highly similar in their commercial impressions.

The first *DuPont* factor thus weighs in favor of finding a likelihood of confusion.

D. The Services, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *Stone Lion*, 110 USPQ2d at 1159; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor 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.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

As identified, the services in the cited registration include various forms of physical fitness instruction and training. Applicant’s services include charitable fundraising and charitable services, both in the field of promoting exercise, healthy eating, fitness and exercise training, and character enrichment. On the face of their respective identifications, Applicant’s services are related to the services in the cited registration inasmuch as both concern providing various aspects of fitness and exercise training.

In support of the refusal of registration, at pages 14-41 of the December 14, 2022 non-final Office action, the Examining Attorney introduced:

- Dare 2 Dream Basketball offers instruction and camps for children in basketball skills, life lessons, physical health and personal growth.
- Alabama Basketball Academy offers basketball instruction, camps and clinics for children and charity basketball tournaments benefiting children’s organizations.
- Eric Montross Father’s Day Basketball Camp and Hoops 4 UNC Children offers instruction in basketball, coaching, and life skills and fundraising for a local children’s hospital.
- Charity Bounce offers inclusive basketball instruction and camps, as well as development of sports, arts, health, education and employment focused social programs.
- USA Basketball Foundation Programs offers basketball instruction, mental and physical wellbeing programs, networking and training for

high school girls, female college athletes and young professional women interested in careers in the sports industry.

This evidence demonstrates that as many as five third parties offer services related to Applicant's services and the services identified in the cited registration.

Applicant argues that it offers narrowly identified services to Native American youth in a unique field and, as a result, its services are unrelated to the registrant's services. 4 TTABVUE 7-10. However, the fitness and exercise related services in the cited registration are not limited to any specific target audience and must be presumed to include Native American youth. *See, e.g., Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (With a broad identification of services, "we must presume that the services encompass all services of the type identified"); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Applicant's narrowing of its identification of services does not serve to narrow the unrestricted services recited in the cited registration, which may include fitness and exercise instruction and training provided to Native American youth.

In this case, the totality of the website evidence demonstrates that consumers are accustomed to seeing various forms of physical fitness instruction and training and charitable fundraising and charitable services, both in the field of promoting exercise, healthy eating, fitness and exercise training, and character enrichment could emanate from the same source.

Applicant is correct that its services are distinguishable from the registrant's services. 4 TTABVUE 7-10. However, it is not necessary for us to find that the services

are indistinguishable or are even competitive to find a likelihood of confusion. *See, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the services] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). In this case, Applicant’s services could be an extension or expansion of the services identified in the cited registration, directed toward Native American youth.

With regard to the third *DuPont* factor, the similarity of the trade channels in which the services are encountered, we must base our likelihood of confusion determination on the services as they are identified in the application and registration at issue. *In re Elbaum*, 211 USPQ at 640; *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976); *see also Octocom*, 16 USPQ2d at 1787 (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed.”).

As discussed above, the services identified in the cited registration are not limited to any particular trade channel and we cannot consider asserted marketplace realities not reflected in its identification. *See Cunningham v. Laser Golf Corp.*,

222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). In the absence of trade channel limitations in the identification of services in the cited registration, we must presume that these services are offered in all customary trade channels therefor. *See Citigroup v. Cap. City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Applicant has submitted no evidence that the fitness services in the cited registration are not or cannot be offered to Native American youth. Simply put, the services in the cited registration are available to any interested consumer, including the Native American youth to whom Applicant directs its services.


We find that the *DuPont* factors of the relatedness of the services, channels of trade and classes of consumers weigh in favor of likelihood of confusion.

E. Conclusion

When we consider and weigh the evidence of record and the relevant likelihood of confusion factors, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023) (“[I]t is important ... that the Board ... weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.”), we conclude that consumers familiar with services identified in the cited registration offered under its mark would be likely to believe, upon encountering Applicant’s mark, that the services originated with or are associated with or sponsored by the same entity. The marks are highly similar. The cited mark is inherently distinctive and there is very little evidence of use or registration by third parties of similar marks. The services

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are related and Applicant's more narrowly identified services will be offered in trade channels that are presumed to be included among those in which the unrestricted services in the cited registration will be encountered.

Decision: The refusal to register Applicant's mark  under Section 2(d) of the Trademark Act is affirmed.