

This Opinion is Not a  
Precedent of the TTAB

Mailed: April 1, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

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*In re Avenida Partners Development Group, LLC*

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Serial Nos. 88833914 and 88833933

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M. Alim Malik of Jackson Tidus  
for Avenida Partners Development Group, LLC.

Trenton M. Davis, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

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Before Shaw, Adlin and Coggins, Administrative Trademark Judges.  
Opinion by Adlin, Administrative Trademark Judge:

Applicant Avenida Partners Development Group, LLC seeks registration of the marks 5 TO THRIVE and FIVE TO THRIVE, both in standard characters, for “a continuing care enrichment wellness program that offers a host of invigorating and stimulating activities that support five key areas of healthy aging,” in International Class 44.<sup>1</sup> The Examining Attorney refused to register both marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks so resemble the previously-registered mark FIVE TO THRIVE, in standard characters,

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<sup>1</sup> Application Serial Nos. 88833914 (the “914 Application”) and 88833933 (the “933 Application”), respectively, each filed March 13, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

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for “providing information in the field of healthcare and wellness via the Internet,” in International Class 44,<sup>2</sup> that they are likely to cause confusion. After the refusals became final, Applicant appealed in both cases, and both appeals are fully briefed.

### **I. Appeals Consolidated**

These appeals involve common questions of law and fact and the records are quite similar. Accordingly, we consolidate and decide both appeals in this single decision. *See In re Binion*, 93 USPQ2d 1531, 1533 (TTAB 2009); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 1214 (2021).<sup>3</sup>

### **II. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry

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<sup>2</sup> Registration No. 4086360, issued January 17, 2012; Section 8 declaration accepted, Section 15 declaration acknowledged.

<sup>3</sup> Citations are to the record in the '914 Application.

mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

#### **A. The Marks**

The mark in the involved '933 Application (FIVE TO THRIVE) and the cited mark (FIVE TO THRIVE) are identical. The mark in the involved '914 Application (5 TO THRIVE) and the cited mark (FIVE TO THRIVE) are quite similar in appearance, and identical in sound, meaning and commercial impression, making them virtually identical overall. *See In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (finding the mark TAKETEN confusingly similar to the mark TAKE 10!); *cf. In re Vanilla Gorilla L.P.*, 80 USPQ2d 1637, 1640 (TTAB 2006) (in context of descriptiveness stating “[t]here is no difference between using the Arabic numeral ‘30’ or the word ‘thirty.’ Both mean exactly the same thing.”). This factor not only weighs heavily in favor of finding a likelihood of confusion, but also reduces the degree of similarity between the services required to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time Warner Ent. Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

#### **B. The Services, Their Channels of Trade and Classes of Consumers**

Before comparing Applicant’s identified services to those in the cited registration, we should point out that Applicant’s arguments about the services misapprehend the applicable law. Specifically, Applicant focuses on the services it and Registrant actually offer in the marketplace, and their actual channels of trade and consumers.

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While those considerations are typically critical in infringement cases, they are of little relevance here.

Indeed, when the issue is registration, as opposed to use, we are constrained to focus on the services as they are identified in the involved applications and cited registration, without regard to Applicant's or Registrant's actual use of the marks. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) ("It is well established that the Board may not read limitations into an unrestricted registration or application.") (quoting *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)).

It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions, because "the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application ... regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed." Even assuming there is no overlap between Stone Lion's and Lion's current customers, the Board correctly declined to look beyond the application and registered marks at issue. An application with "no restriction on trade channels" cannot be "narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers."

*Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Jump Designs LLC*, 80

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USPQ2d 1370, 1374 (TTAB 2006) (unrestricted and broad identifications are presumed to encompass all goods of the type described).<sup>4</sup>

Here, Applicant provides “a continuing care enrichment wellness program that offers a host of invigorating and stimulating activities that support five key areas of healthy aging,” which is identified broadly enough to encompass “providing information in the field of healthcare and wellness via the Internet.” In fact, it is hard to imagine any type of “wellness program” that does not include providing healthcare and wellness information to participants. That information could include, for example, instruction on how to perform the “invigorating and stimulating activities” Applicant offers, or tips for “healthy aging.” Moreover, given the Internet’s ubiquity, and importance to all types of commerce, the wellness program could very well disseminate healthcare and wellness information “via the Internet.”

Similarly, Registrant’s services are broadly identified as “providing information in the field of healthcare and wellness via the Internet,” which could include providing information, on a website, in the form of, or related to, a “continuing care wellness program” that includes “invigorating and stimulating activities that support five key areas of healthy aging.”

In other words, because Applicant’s services could encompass Registrant’s, and Registrant’s services could encompass Applicant’s, the services are legally identical.

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<sup>4</sup> Therefore, the distinctions Applicant draws between its services and Registrant’s services, such as that Registrant’s are targeted to cancer patients/survivors and that Applicant’s are only provided to residents of Applicant’s facilities, 4 TTABVUE 8-10, are irrelevant. The problem is that the limitations Applicant cites are not included in either Applicant’s or Registrant’s identification of services.

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Moreover, because the services are legally identical, we presume that the channels of trade and classes of purchasers for these services overlap. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

Even if the services were not considered legally identical, the Examining Attorney has established that they are at least related. For example, an article on “concentra.com” entitled “What is a Wellness Program?” explains that a wellness program “is a comprehensive health initiative designed to maintain or improve well-being through proper diet, exercise, stress management, and illness prevention.” February 25, 2021 Office Action TSDR 5.<sup>5</sup> The article goes on to explain that providers of wellness programs, often employers hoping to improve or support their employees’ health, “can provide information in a variety of formats, such as wellness videos, pamphlets, health-related quizzes, and bulletin boards.” *Id.* at 6. Obviously, each of these “formats” can be provided online.

Furthermore, an “aetna.com” article entitled “Employee Health and Wellness Programs” reveals that Aetna Health Connections offers health and wellness

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<sup>5</sup> Citations to the application file are to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) online database, by page number, in the downloadable .pdf format. Citations to the appeal record are to TTABVUE, the Board’s online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

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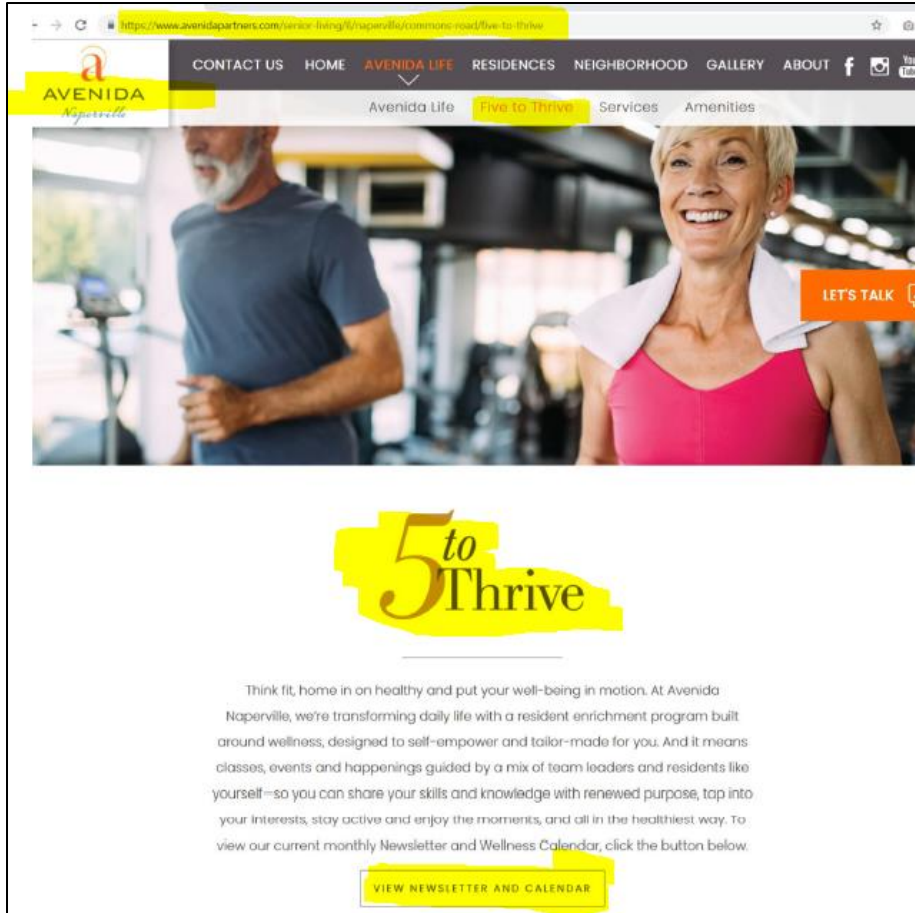
programs, including “Simple Steps To A Healthier Life®,” which is an “online program.” *Id.* at 10. Similarly, Aetna Health Connections’s “Get Active!”<sup>SM</sup> program “features an online fitness and nutrition tracker,” “emails” and a “social networking component.” *Id.* at 14. Thus, employees of Aetna-insured companies who participate in Aetna Health Connections wellness programs will likely be aware that wellness programs may include providing healthcare and wellness-related information via the Internet.<sup>6</sup>

Moreover, the record shows that Applicant’s and Registrant’s services are complementary, because providing health-related information via the Internet is an element or optional feature of at least some wellness programs. It is settled that complementary services such as these may be found related. *See In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *Gen. Mills, Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1597-98 (TTAB 2011), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009).

It does not escape notice that Applicant’s 5/FIVE TO THRIVE program itself provides information via the Internet. In fact, Applicant introduced the program’s website, which includes links to the program’s newsletter and calendar, which obviously include information about the program, and health and wellness generally:

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<sup>6</sup> Applicant’s argument that “[n]either [Applicant] [n]or Registrant are in the same space as Aetna,” 7 TTABVUE 5 n.3, is irrelevant. The Aetna evidence is probative because it shows that some consumers encounter both wellness programs and health and wellness information provided via the Internet under the same marks.



December 4, 2020 Office Action response TSDR 19 (emphasis added); *see also id.* at 24-25.<sup>7</sup>

In addition to showing that there is a relationship between Applicant's and Registrant's services, this evidence reveals that the channels of trade and classes of consumers overlap. Specifically, health and wellness programs sometimes provide not just in-person physical fitness activities, group discussions, classes, and

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<sup>7</sup> Applicant's reliance on *In re Thor Tech, Inc.*, 113 USPQ2d 1546 (TTAB 2015), is misplaced. This case is nothing like *Thor Tech* because, among other things, the applicant in *Thor Tech* established through "pairs" of coexisting third-party registrations that identical marks were registered to one party for the applicant's goods and another party for the registrant's goods. Applicant did not introduce any such evidence here.



screenings for disease, but also health and wellness information related thereto distributed online. Furthermore, providers of information in the field of healthcare and wellness via the Internet, such as Applicant and Aetna, sometimes also provide in-person wellness programs. As for wellness program participants/consumers, they may also consume information in the field of healthcare and wellness via the Internet, including information disseminated by their wellness programs. It is also clear from the record that some consumers of information in the field of healthcare and wellness provided via the Internet will also be consumers of or participants in wellness programs.<sup>8</sup> These factors also weigh in favor of finding a likelihood of confusion.

### **C. Purchaser Sophistication and Care**

We accept Applicant's argument that because Applicant's and Registrant's services are health-related, consumers will exercise a heightened degree of care in purchasing. This factor weighs against finding a likelihood of confusion.

### **III. Conclusion**

The marks are identical or virtually identical, the services are legally identical or at the very least related, and the channels of trade and classes of consumers overlap. These factors outweigh any consumer sophistication or care in purchasing. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *Carlisle*

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<sup>8</sup> Applicant's argument that its channels of trade differ from Registrant's because Applicant's services are provided via "daily real-life events and happenings," whereas Registrant's are provided only online, 4 TTABVue 11-12, is unpersuasive. The attempted limitation of Applicant's services to "daily real-life events and happenings" is not reflected in Applicant's identification of services. Thus, Applicant's services could be (and to some extent are) offered not only in "real-life," but also online.

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*Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970); *see also*, *HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweighed sophisticated purchasers, careful purchasing decision, and expensive goods). Confusion is likely.

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