

ESTTA Tracking number: **ESTTA431828**

Filing date: **09/22/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	beBetter Health, Inc.		
Entity	Corporation	Citizenship	West Virginia
Address	6 Craddock Way Poca, WV 25159 UNITED STATES		

Attorney information	Richard W. James Spilman Thomas & Battle, PLLC One Oxford Centre Suite 3440 301 Grant Street Pittsburgh, PA 15219 UNITED STATES rjames@spilmanlaw.com Phone:412-325-3309
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Applicant Information

Application No	77706226	Publication date	08/23/2011
Opposition Filing Date	09/22/2011	Opposition Period Ends	09/22/2011
Applicant	Falls Church Pilates, LLC 513 West Broad Street Falls Church, VA 22046 UNITED STATES		

Goods/Services Affected by Opposition

Class 035. All goods and services in the class are opposed, namely: Retail store and on-line retail store services featuring clothing and health and fitness products

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	BEBETTER (U.S. Application No. 85427704, filed 09/20/2011)		
Goods/Services	Class 035: On-line retail store services featuring dishware, placemats, and brochures; Retail services by direct solicitation by sales agents in the field of brochures, dishware, clothing, and health and fitness products. Class 021: Dinnerware; Dishware; Plastic water bottles sold empty; Sports bottles sold empty.		

U.S. Registration No.	3533025	Application Date	05/07/2007
Registration Date	11/18/2008	Foreign Priority Date	NONE
Word Mark	BEBETTER		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 044. First use: First Use: 2000/10/05 First Use In Commerce: 2000/10/05 Health care services in the nature of providing worksite health risk management wellness programs aimed at reducing healthcare costs and maximizing productivity		

U.S. Registration No.	3725970	Application Date	05/10/2007
Registration Date	12/15/2009	Foreign Priority Date	NONE
Word Mark	BEBETTER HEALTH		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 044. First use: First Use: 2009/09/02 First Use In Commerce: 2009/09/02 Health care services in the nature of providing worksite health risk management wellness programs aimed at reducing healthcare costs and maximizing productivity		

Attachments	77174394#TMSN.jpeg (1 page)(bytes) 77177540#TMSN.jpeg (1 page)(bytes) OPPOSITION_AS_FILED.pdf (11 pages)(270343 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/Richard W. James/
Name	Richard W. James
Date	09/22/2011

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

**To the United States Patent and Trademark Office
Trademark Trial and Appeal Board
PO Box 1451
Alexandria, Virginia 22313-1451**

**In the matter of Trademark Application Serial No. 77706226
For the mark: BEBETTER
Published for Opposition on August 23, 2011**

BEBETTER HEALTH, INC.,)	Opposition No. _____
)	
Opposer,)	
)	
v.)	
)	
FALLS CHURCH PILATES, LLC.,)	
)	
Applicant.)	

Notice of Opposition

Opposer beBetter Health, Inc. (hereinafter “beBetter Health”), a West Virginia corporation whose address is 6 Craddock Way, Poca, WV, 25159, believes that it would be damaged by the registration of the mark BEBETTER, Application Serial No. 77/706226 applied for by Falls Church Pilates, a Virginia Limited Liability Company (hereinafter “Falls Church Pilates”), whose address is 513 West Broad Street, Falls Church, VA 22046.

Falls Church Pilates’s Application Serial Number 77/706226 is described as follows:

Mark: BEBETTER

Goods and Services: Retail store and on-line retail store services featuring clothing and health and fitness products in International Class 035.

Filed April 3, 2009

Current Filing Basis: 1(b) intent to use.

As grounds for opposition it is alleged that:

1. beBetter Health owns and uses the marks BEBETTER and BEBETTER HEALTH in connection with health care services in the nature of providing worksite health risk management wellness programs aimed at reducing healthcare costs and maximizing productivity. Additionally, beBetter Health owns and uses the mark BEBETTER in connection with dinnerware, dishware, plastic water bottles sold empty, sports bottles sold empty and on-line retail store services featuring dishware, placemats, and brochures; and retail services by direct solicitation by sales agents in the field of brochures, dishware, clothing and health and fitness products.
2. beBetter Health's first use and first use in commerce of its BEBETTER mark was at least as early as October 5, 2000.
3. beBetter Health's mark, BEBETTER, is an active federally registered mark for goods and services in international class 044 for health care services in the nature of providing worksite health risk management wellness programs aimed at reducing healthcare costs and maximizing productivity, with a registration number of 3533025, and was registered on November 18, 2008.
4. beBetter Health applied to register the mark BEBETTER on September 21, 2011, with an application serial number 85427704 (*See Exhibit A, attached hereto*), in international class 021 for dinnerware, dishware, plastic water bottles sold empty, sports bottles sold empty; and in international class 035 for on-line retail store services featuring dishware, placemats, and brochures; retail services by direct solicitation by sales agents in the field of brochures, dishware, clothing and health and fitness products. beBetter Health first used the mark BEBETTER in commerce in connection with the goods and services listed in international classes 021 and 035 at least as early as December 31, 2007.
5. beBetter Health's first use and first use in commerce of its BEBETTER HEALTH mark was at least as early as September 2, 2009.
6. beBetter Health's mark, BEBETTER HEALTH, is an active federally registered mark for goods and services in international class 044 for health care services in the nature of providing worksite health risk management wellness programs aimed at reducing healthcare costs and maximizing productivity, with a registration number of 3725970 and was registered on December 15, 2009.
7. Falls Church Pilates filed an intent to use application for the mark BEBETTER on April 3, 2009 in international class 035 for retail store and on-line retail store services featuring clothing and health and fitness products; and in international class 041 for physical fitness training services; providing assistance, personal training and physical fitness consultation to individuals to help them make physical fitness, strength, conditioning, and exercise improvement in their daily living; yoga instruction.
8. On June 29, 2009, the assigned trademark examining attorney issued an office action refusing Falls Church Pilates' registration for BEBETTER for classes 035 and 041 under Section

2(d) of the Trademark Act because of a likelihood of confusion with beBetter Health's mark, BEBETTER, U.S. Registration No. 3533025 as well as the mark B BETTER CREATING A BETTER WAY OF BEING, U.S. Registration No. 3397712.

9. On November 24, 2010, the assigned trademark examining attorney issued a final office action refusing Falls Church Pilates' registration for BEBETTER for class 041 under section 2(d) of the Trademark Act because of a likelihood of confusion with beBetter Health's marks BEBETTER, U.S. Registration No. 3533025, and BEBETTER HEALTH, U.S. Registration No. 3725970.

10. beBetter Health has continuously used the mark BEBETTER since 2000 and BEBETTER HEALTH since 2009 in connection with its worksite wellness services, including health risk assessment, wellness program management, development in the area of fitness, smoking and nutrition, and health coaching and lifestyle management services; and has continuously used the mark BEBETTER in connection with dinnerware, dishware, plastic water bottles sold empty, and sports bottles sold empty; as well as on-line retail store services featuring dishware, placemats, and brochures; and retail services by direct solicitation by sales agents in the field of brochures, dishware, clothing and health and fitness products, since 2007.

11. beBetter Health has registered the domain name for its website, www.bebetterhealth.com, where it markets and advertises its goods and services in connection with its marks.

12. beBetter Health has also registered THE PORTION PLATE, U.S. Registration No. 2875778, for educational and functional dinner plate illustrating proper dietary portions, and beBetter Health owns the domain name www.theportionplate.com, where beBetter Health sells food portion control products and other health related products in connection with the BEBETTER HEALTH mark.

13. Based on the preceding, beBetter Health asserts that it has occupied the market for retail services in the field of clothing and health and fitness products and a broad range of other health and fitness related products and services, using its BEBETTER and BEBETTER HEALTH marks.

14. In view of beBetter Health's prior and current use of the marks BEBETTER and BEBETTER HEALTH, Falls Church Pilates is not entitled to registration of the mark BEBETTER in connection with retail store and on-line store services for clothing, health and fitness products in class 035, because beBetter Health has already occupied this market.

15. Falls Church Pilates' registration should be refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), because it so resembles the marks BEBETTER and BEBETTER HEALTH, which were previously used by beBetter Health in the United States and which were registered, and for which registrations have been filed, by beBetter Health, when used on or in connection with the services Falls Church Pilates recites in its application for registration, as to be likely to cause confusion or mistake in the marketplace.

16. Falls Church Pilates' application for registration of the BEBETTER mark that it intends to use should be denied because Falls Church Pilates is not (and was not, at the time of the filing of its application for registration) the rightful owner of the mark at issue.

WHEREFORE, beBetter Health requests that Application Serial No. 77/706226 be denied, and that this Opposition be sustained in favor of beBetter Health. The required opposition fee is submitted herewith.

Respectfully Submitted,

/s/Richard W. James

Richard W. James

Registration No. 43,690

Attorney for beBetter Health, Inc.

Spilman Thomas & Battle

One Oxford Centre, Suite 3440

301 Grant Street

Pittsburgh, PA 15219

Phone: (412) 325-3309

Facsimile: (412) 325-3324

rjames@spilmanlaw.com

Dated: September 22, 2011

EXHIBIT A

Trademark Electronic Application System (TEAS) filing receipt

MARK: BEBETTER (Standard Characters, mark.jpg)

The literal element of the mark consists of BEBETTER.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

We have received your application and assigned serial number '85427704' to your submission. The summary of the application data, *bottom below*, serves as your official filing receipt.

In approximately 3 months, an assigned examining attorney will review your application to determine if all legal requirements are met. Currently, your mark is **not** registered and is considered a "pending" application. The overall process from the time of initial filing to registration or final refusal can take 13-18 months or even longer, depending on many factors; *e.g.*, the correctness of the original filing and the type of application filed. It is **CRITICAL** that you check the status of your application **at least every 3 - 4 months** and promptly contact the Office if a letter (an "Office action") or notice has issued for your application that you did not receive or do not understand. To check the status, please use <http://tarr.uspto.gov>. Do **not** submit status requests to TEAS@uspto.gov. Failure to respond timely to any Office action or notice may result in the abandonment of your application, requiring you to pay an additional fee to have your application revived even if you did not receive the Office action or notice.

Please view all incoming and outgoing correspondence at <http://portal.uspto.gov/external/portal/tow>. If your status check reveals an issued Office action or notice that you did not receive, immediately view the action/notice through the USPTO website. The USPTO does not extend filing deadlines due to a failure to receive USPTO mailings/e-mailings. You must ensure that you update your record if your mail and/or e-mail address changes, using the form available at <http://www.uspto.gov/teas/eTEASpageE.htm>.

If you discover an error in the application data, you may file a Voluntary Amendment, at <http://www.uspto.gov/trademarks/teas/miscellaneous.jsp>. Do **not** submit any proposed amendment to TEAS@uspto.gov, because the technical support team may not make any data changes. **NOTE:** You must wait approximately 7-10 days to submit any Voluntary Amendment, to permit initial upload of your serial number into the USPTO database. The acceptability of any Voluntary Amendment will only be determined once regular examination begins, since the assigned examining attorney must decide whether the change proposed in the amendment is permissible. **Not all errors may be corrected;** *e.g.*, if you submitted the wrong mark, if the proposed correction would be considered a material alteration to your original filing, it will not be accepted, and your only recourse would be to file a new application (with **no** refund for your original filing).

Since your application filing has already been assigned a serial number, please do **not** contact TEAS@uspto.gov to request cancellation. The USPTO will only cancel the filing and refund your fee if upon review we determine that the application did not meet minimum filing requirements. **The fee is a processing fee that the USPTO does not refund, even if your mark does not proceed to registration.** **NOTE:** The only "exception" to the above is if you inadvertently file duplicate applications specifically because of a *technical glitch* and not merely a misunderstanding or mistake; *i.e.*, if you believe that the first filing did not go through because no confirmation was received and

then immediately file again, only to discover later that both filings were successful, then the technical support team at TEAS@uspto.gov can mis-assign and refund one of the filings.

WARNING: You may receive unsolicited communications from companies requesting fees for trademark related services, such as monitoring and document filing. Although solicitations from these companies frequently display customer-specific information, including USPTO serial number or registration number and owner name, companies who offer these services are not affiliated or associated with the USPTO or any other federal agency. The USPTO does not provide trademark monitoring or any similar services. For general information on filing and maintenance requirements for trademark applications and registrations, including fees required by law, please consult the USPTO website.

APPLICATION DATA: Trademark/Service Mark Application, Principal Register TEAS Plus Application

The applicant, beBetter Health, Inc., a corporation of West Virginia, having an address of
Renaissance Tower, First Floor,
109 Capitol Street
Charleston, West Virginia 25301
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

International Class 021: Dinnerware; Dishware; Plastic water bottles sold empty; Sports bottles sold empty

In International Class 021, the mark was first used at least as early as 12/31/2007, and first used in commerce at least as early as 12/31/2007, and is now in use in such commerce. The applicant is submitting one specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) Digital image of plate.

Specimen-1 [spec-7498198188-221140357_._adult-food-plate.jpg]

International Class 035: On-line retail store services featuring dishware, placemats, and brochures; Retail services by direct solicitation by sales agents in the field of brochures, dishware, clothing, and health and fitness products

In International Class 035, the mark was first used at least as early as 12/31/2007, and first used in commerce at least as early as 12/31/2007, and is now in use in such commerce. The applicant is submitting one specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) Screen capture of website.

Specimen-1 [spec-1-7498198188-221140357_._Portion_Plate_Products.jpg]

For informational purposes only, applicant's website address is: <http://www.bebetterhealth.com/>

The applicant's current Attorney Information:

Richard W. James of Spilman Thomas & Battle, PLLC

One Oxford Centre, Suite 3440

301 Grant Street

Pittsburgh, Pennsylvania 15219

United States

The attorney docket/reference number is 011919.0016.

The applicant's current Correspondence Information:

Richard W. James

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412-325-3324(fax)

rjames@spilmanlaw.com (authorized)

A fee payment in the amount of \$550 will be submitted with the application, representing payment for 2 class(es).

Declaration

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Declaration Signature

Signature: /Richard W. James/ Date: 09/20/2011

Signatory's Name: Richard W. James

Signatory's Position: Attorney of record, Pennsylvania bar member

Thank you,

The TEAS support team

Tue Sep 20 22:30:40 EDT 2011

STAMP: USPTO/FTK-74.98.198.188-20110920223040703250-85427704-480b28574e2e689cc4fd083cd393ce54-DA-12575-20110920221140357306

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ADULT PORTION PLATE PRODUCTS



DIABETES PORTION PLATE PRODUCTS



KIDS PORTION PLATE PRODUCTS



SPANISH PORTION PLATE PRODUCTS



ADULT PORTION PLATE PRODUCTS

 Adult Portion Plate, Standard SKU: PP-001 PRICE: \$19.95 Add to Cart	 Adult Portion Plate, Standard, 12 Pack SKU: PP-012 PRICE: \$179.95 Add to Cart	 Adult Portion Plate, Standard, 24 Pack SKU: PP-024 PRICE: \$319.95 Add to Cart
 Adult Portion Plate, Standard, 36 Pack SKU: PP-036 PRICE: \$459.95 Add to Cart	 Adult Portion Plate, Standard, 48 Pack SKU: PP-048 PRICE: \$599.95 Add to Cart	 Adult Portion Plate, Standard, 60 Pack SKU: PP-060 PRICE: \$739.95 Add to Cart
 Adult Portion Plate, Standard, 72 Pack SKU: PP-072 PRICE: \$879.95 Add to Cart	 Adult Portion Plate, Standard, 84 Pack SKU: PP-084 PRICE: \$1019.95 Add to Cart	 Adult Portion Plate, Standard, 96 Pack SKU: PP-096 PRICE: \$1159.95 Add to Cart
 Adult Portion Plate, Standard, 108 Pack SKU: PP-108 PRICE: \$1299.95 Add to Cart	 Adult Portion Plate, Standard, 120 Pack SKU: PP-120 PRICE: \$1439.95 Add to Cart	

KIDS PORTION PLATE PRODUCTS

 Kids Portion Plate, Standard SKU: KP-001 PRICE: \$19.95 Add to Cart	 Kids Portion Plate, Standard, 12 Pack SKU: KP-012 PRICE: \$179.95 Add to Cart	 Kids Portion Plate, Standard, 24 Pack SKU: KP-024 PRICE: \$319.95 Add to Cart
 Kids Portion Plate, Standard, 36 Pack SKU: KP-036 PRICE: \$459.95 Add to Cart	 Kids Portion Plate, Standard, 48 Pack SKU: KP-048 PRICE: \$599.95 Add to Cart	 Kids Portion Plate, Standard, 60 Pack SKU: KP-060 PRICE: \$739.95 Add to Cart
 Kids Portion Plate, Standard, 72 Pack SKU: KP-072 PRICE: \$879.95 Add to Cart	 Kids Portion Plate, Standard, 84 Pack SKU: KP-084 PRICE: \$1019.95 Add to Cart	 Kids Portion Plate, Standard, 96 Pack SKU: KP-096 PRICE: \$1159.95 Add to Cart

DIABETES PORTION PLATE PRODUCTS

 Diabetes Portion Plate SKU: DP-001 PRICE: \$19.95 Add to Cart	 Diabetes Portion Plate, 12 Pack SKU: DP-012 PRICE: \$179.95 Add to Cart
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SPANISH PORTION PLATE PRODUCTS

 Spanish Adult Portion Plate SKU: SAP-001 PRICE: \$19.95 Add to Cart	 Spanish Kids Portion Plate SKU: SKP-001 PRICE: \$19.95 Add to Cart	 Spanish Diabetes Portion Plate SKU: SDP-001 PRICE: \$19.95 Add to Cart
 Spanish Adult Portion Plate, 12 Pack SKU: SAP-012 PRICE: \$179.95 Add to Cart		