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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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| Applicant | Jevona Battle |
| Applied for Mark | BATTLE FITNESS |
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Serial No. 88/029,949

Applicant: Jevona Battle

Mark: **BATTLE FITNESS**

Examining Atty: Sarah E. Kunkleman
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APPLICANT'S *EX PARTE* REPLY BRIEF

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COMES NOW Applicant, Jevona Battle, and hereby submits this Reply Brief in response to the Examining Attorney’s brief filed January 18, 2020. Applicant has appealed the Examining Attorney’s refusal to register Applicant’s BATTLE FITNESS mark in standard characters on the



grounds of a likelihood of confusion with the marks in Registration No. 5,257,350



(“BATTLE FIT & Design Mark”) and in Registration No. 5,140,126 (BODY BATTLE FITNESS & Design Mark”), pursuant to Trademark Act § 2(d), 15 U.S.C. § 1052(d).

Applicant introduced 23 third-party to demonstrate that the term “BATTLE” is weak and diluted for physical fitness and/or sports activities in Class 41. Despite the Examining Attorney’s assertion to the contrary, active third-party registrations, are relevant to show that a mark or a **portion of a mark** (in this case, the word “BATTLE”) is descriptive, suggestive, or so commonly used in a particular industry that the public will look to other elements to distinguish the source of the goods and services. *Juice Generation, Inc. v. GS Enters. LLC*, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). “Third party registrations are relevant to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Id.* at 1675. (internal quotation marks omitted); *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). The “real evidentiary value of third party registrations per se is to show the sense in which . . . a mark is used in ordinary parlance,” *Juice Generation*, 115 USPQ2d at 1675 (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015)). The number of third-party registered marks all owned by

different entities indicates that “BATTLE” is highly suggestive as applied to physical fitness and/or sport activity services. The term “BATTLE,” in this context alludes to services that involve fighting against an individual’s current physical condition or working hard to reach a desired fitness goal. Consequently, the Examining Attorney’s proclamation that “the third-party registration evidence does not obviate the similarity of the applied-for mark and the registered marks.” Examiner’s Brief at 5.

Contrary to the Examining Attorney’s assertions that the third-party registrations are entitled to little weight due to the insufficient evidence of how the marks are used in commerce, Applicant did in fact submit use in commerce evidence with respect to a majority of the third-party “BATTLE” registrations. *See* Applicant’s RFR of Sept. 3, 2019, Exhibits AD, AF, AH, AJ, AL, AN, AP, AR, AT, AV, AX, AZ, BB, BF, BH, BJ, BL, BQ. As such, there is ample evidence in the record, showing how the third-party marks are actually used in commerce, including use in commerce evidence and the most recently submitted specimens of use for each of the third-party registrations. Applicant’s Brief at 17-20. As a result, the Examining Attorney’s claim that the “third-party registrations are entitled to little weight” because they are not evidence of how the marks are used in commerce is misplaced. Examiner’s Brief at 5.

Further, Applicant has also submitted evidence of third-party common law use of marks containing the term “BATTLE” for various types of fitness training services. *See* Applicant’s Brief at 15-16. The Examining Attorney claims that the third-party common law use evidence contains additional wording and design elements, which distinguish the common law marks from Applicant’s mark and the cited registration, limiting the probative value of this evidence. Examiner’s Brief at 4. The purpose of the third-party use evidence, however, is to demonstrate that the term “BATTLE” is commercially weak in the fields of fitness, exercise, and sports

services. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (“The purpose of a defendant introducing third-party uses it to show that customers have become so conditioned by a plethora of such similar marks that consumers ‘have been educated to distinguish between different such marks on the bases of minute distinctions.’”). The third-party use evidence, here, including the use evidence found on the Internet for a majority of the third-party registrations corroborates the third-party registration evidence to the extent that it shows that “BATTLE” is commercially weak as multiple gyms, studios, and exercise facilities provide fitness services under a brand name that includes the term “BATTLE.” This evidence, therefore, is not only highly probative for purposes of demonstrating that there is no likelihood of confusion among the marks, but also indicates that consumers have become conditioned to encountering marks containing the term “BATTLE” and focus on other features of the marks to determine source. Contrary to the Examining Attorney’s meritless assertions, the sixth *du Pont* factor, the number and nature of similar marks in use on similar goods, does **not** favor a finding of likelihood of confusion.

With respect to similarity of the marks, Applicant’s mark is different in appearance from the cited BATTLE FIT & Design Mark and BODY BATTLE FITNESS & Design Mark. Here, the cited marks are composite marks that contain words and design features, whereas Applicant’s mark is a standard character mark. When the Board compares a standard character mark to a composite mark for Section 2(d) purposes, the Board considers “variations of the depictions of the standard character mark *only with regard to* ‘font style, size, or color’ or the ‘words, letters, numbers, or any combination thereof.’” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1187 (TTAB 2018) (emphasis in original). In fact, the Federal Circuit in *Viterra* did not explicitly address whether a standard character could be depicted with any design element:

In rejecting the ‘reasonable manners’ test, we are not suggesting that a standard character mark encompasses all possible design elements of the mark. We leave for future cases to determine the appropriate method of comparing design marks with standard character marks.

In re Viterra Inc., 101 USPQ2d 1905, 1910 (Fed. Cir. 2012). Therefore, even 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.

The eye-catching portion of each of the cited registrations differs from the dominant



portion of Applicant’s mark. In the mark, the focal point of the mark is the term “FIT” as it is significantly larger in size and emphasized in the mark because it is encompassed inside of the red military-style emblem. Despite being disclaimed in the registration, the term “FIT” visually stands out in the BATTLE FIT & Design Mark. The dominant portion of the cited



mark, on the other hand, is the phrase “BODY BATTLE” as it is bolder and larger in size compared to the term “FITNESS.”¹ The term “FITNESS” is also disclaimed in the registration. Given that Applicant’s mark does not contain the word “BODY” and has disclaimed the word “FITNESS,” the dominant portion of Applicant’s mark is “BATTLE.”

Applicant’s mark also differs from the cited registrations with respect to commercial impression. The term “BATTLE” is also the last name of the owner of Applicant’s mark, and

¹ It is not likely that Applicant’s BATTLE FITNESS mark would be interpreted by consumers as the shortened version of BODY BATTLE FITNESS & Design Mark as it does not contain the term “BODY,” which is one of the dominant words in Registrant’s mark.

therefore conveys that the fitness studio was founded “Jevona Battle.” No such commercial impression is present in either of the cited registrations. The BATTLE FIT & Design Mark creates an association with the military due to the red military-style emblem design around the term “FIT.” As such, the mark suggests that Registrant’s fitness training services and fitness classes use team building and military training techniques to challenge one’s physical fitness and put one into good health due to the exercises. Conversely, the BODY BATTLE FITNESS & Design Mark conveys that Registrant’s fitness classes involve fighting or combat against another person in a manner that uses one’s entire body. The shield design of a silhouette of a man and a silhouette of a woman running towards another connotes the idea of the inner body battle one has in his or her fitness journey. Neither of the connotations from the cited registrations are conveyed by Applicant’s BATTLE FITNESS mark.

By reason of the arguments contained herein and those incorporated in Applicant’s Appeal Brief, there is no likelihood of confusion between Applicant’s mark and the cited BATTLE FIT & Design Mark and/or the cited BODY BATTLE FITNESS & Design Mark. Applicant’s mark is different from the cited marks in appearance, sound, and overall commercial impression. “No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark.” *In re Mighty Leaf*, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). Given the extensive evidence of third-party use of marks containing the term “BATTLE,” consumers will rely on the other elements of the marks and their commercial impressions as a whole to distinguish the marks. *See Sure-Fit Products Co. v. Saltzon Drapery Co.*, 117 USPQ 295, 297 (CCPA 1958); *see also Puma-Sportschuhfabriken Rudolf Dassler KG v. Superga Spa*, 210 USPQ 316, 317 (TTAB 1980) (where plaintiff adopts a commonly used mark, “his competitors may come closer to his mark without violating his rights

than would be the case with a strong mark”).

WHEREFORE, Applicant respectfully requests that the Board REVERSE the statutory refusal pursuant to Trademark Act Section 2(d) and allow the Application to proceed to publication.

Dated this 24th day of January, 2020.

Respectfully submitted,



Erik M. Pelton