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Subject:	U.S. Trademark Application Serial No. 90556088 - OXELIFE - - 127819-3006 - Examiner Brief
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Attachments

United States Patent and Trademark Office (USPTO)

U.S. Application Serial No. 90556088

Mark: OXELIFE

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Applicant: OxeFit, Inc.

Reference/Docket No. 127819-3006

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant appeals the trademark examining attorney's refusal to register the applied-for mark, OXELIFE, based on likelihood of confusion with the marks in U.S. Registration No. 6331409 for OXEHEALTH and U.S. Registration No. 6681463 for OXEVISION, both owned by Oxehealth Limited.

FACTS AND PROCEDURAL HISTORY

This application was filed on filed on March 2, 2021. Registration was refused in the September

24, 2021 office action under Trademark Act Section 2(d) based on likelihood of confusion with U.S. Registration No. 6331409, OXEHEALTH. Registration was refused under Trademark Act Section 2(d) based on likelihood of confusion with U.S. Registration No. 6681463, OXEVISION, in the November 21, 2022 office action.[1] The refusals were made final in the May 28, 2023 final action, and continued in the December 18, 2023 denial of reconsideration. Applicant filed this appeal on November 22, 2023.[2]

U.S. Registration No. 6331409 is "OXEHEALTH" in standard characters, for goods and services including:

> Class 9: Downloadable software for use in health monitoring and tracking services in the field of healthcare and patient care and for use in monitoring and tracking of the health and safety of human beings and animals in the field of healthcare; downloadable software for monitoring and tracking the health and safety of human beings and animals; downloadable software for monitoring and tracking vital signs, including blood pressure, oxygen saturation levels, temperature, heart rate and breathing rate; downloadable software for monitoring and tracking sleep in human beings and animals; downloadable software for monitoring and tracking the movement, location and proximity of human beings and animals; downloadable software enabling real time status and alert services for the purpose of monitoring and tracking the activity, sleep, movement, location, proximity, health and safety of human beings and animals; cameras; hardware in the nature of computer hardware; hardware for cameras, namely, sensors for cameras in the nature of temperature sensors, optical sensors, proximity sensors, infrared sensors and motion sensors; hardware for cameras, namely, lenses for cameras and filters for camera lenses; electronic devices for monitoring and tracking the health, safety, movement, location, proximity and sleep of human beings and animals in the nature of lasers, contact sensors, non-contact sensors, temperature sensors, optical sensors, proximity sensors, pressure sensors, infrared sensors and motion sensors and radar
>
> Class 42: Software as a service (SAAS) services featuring software for the monitoring and tracking of the health and safety of human beings and animals; software as a service (SAAS) services featuring software for the monitoring and tracking of vital signs, including blood pressure, oxygen saturation levels, temperature, heart rate and breathing rate; software as a service (SAAS) services featuring software for the monitoring and tracking of sleep in human beings and animals; software as a service (SAAS) services featuring software for the monitoring and tracking of the movement, location and proximity of human beings and animals; software as a service (SAAS) services featuring software for providing real time status and alert services for monitoring and tracking the activity, sleep, movement, location, proximity, health and safety of human beings and animals; information, advisory and consultancy services related thereto; Providing temporary use of online non-downloadable software for use in health monitoring and tracking services in the field of healthcare and patient care and for use in monitoring and tracking of the health and safety of human beings and animals in the field of healthcare.

U.S. Registration No. 6681463 is "OXEVISION" in standard characters, for goods and services including:

Class 9: Downloadable software for monitoring and tracking the health and safety of human beings and animals in the nature of monitoring and tracking vital signs, including blood pressure, oxygen saturation levels (SP02), temperature, heart rate and breathing rate; Downloadable software for monitoring and tracking vital signs, including blood pressure, oxygen saturation levels (SPO2), temperature, heart rate and breathing rate; Downloadable software for monitoring and tracking sleep in human beings and animals; Downloadable software for monitoring and tracking the movement, location and proximity of human beings and animals; Downloadable software enabling real time status and alert services for the purpose of monitoring and tracking the activity, sleep, movement, location, proximity, health and safety of human beings and animals; cameras; lenses for cameras; filters for camera lenses; hardware for cameras, namely, sensors for cameras in the nature of temperature sensors, optical sensors, proximity sensors, infrared sensors and motion sensors; camera modules; sensing modules, namely, temperature sensors, optical sensors, proximity sensors, infrared sensors and motion sensors for cameras; electronic devices, apparatus and instruments for receiving, gathering monitoring, analysing, measuring, and transmitting images, information and data from cameras in the nature of lasers not for medical purposes, contact sensors, non-contact temperature, optical, proximity, pressure, infrared, and motion sensors, temperature sensors, optical sensors, proximity sensors, pressure sensors, infrared sensors and illuminators, and motion sensors and radar; electronic devices for monitoring and tracking the health, safety, movement, location, proximity and sleep of human beings and animals in the nature of lasers not for medical purposes, contact sensors, non-contact temperature, optical, proximity, pressure, infrared, and motion sensors, temperature sensors, optical sensors, proximity sensors, pressure sensors, infrared sensors and motion sensors and radar

Class 42: Software as a service (SaaS) services featuring software for the monitoring and tracking of the health and safety of human beings and animals; software as a service (SaaS) services featuring software for the monitoring and tracking of vital signs, including blood pressure, oxygen saturation levels (SP02), temperature, heart rate and breathing rate; software as a service (SaaS) services featuring software for the monitoring and tracking of the movement, location and proximity of human beings and animals; software as a service (SaaS) services featuring software for providing real time status and alert services for monitoring and tracking the activity, sleep, movement, location, proximity, health and safety of human beings and animals; information, advisory and consultancy services relating to the aforesaid.

The mark in the application is "OXELIFE" in standard characters, for:

Class 42: Software as a service (SAAS) services featuring software for analyzing, displaying, managing and recording statistical data, goals, information, programs and metrics in the fields of exercise and physical fitness, in each case for use with exercise and physical fitness equipment, namely upper and lower body cardiovascular conditioning machines and weight lifting machines; providing temporary use of non-downloadable computer application software for mobile devices, namely, software to assist the user with exercise and physical fitness for use in connection with exercise and physical fitness equipment, namely, upper and lower body cardiovascular conditioning machines and weight lifting machines

TRADEMARK ACT SECTION 2(d) - LIKELIHOOD OF CONFUSION

REFUSAL TO REGISTER

Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the goods and/or services of the parties. 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (called the "du Pont factors"); *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017).

In ex parte examination the primarily considerations are: (1) the similarities between the compared marks and (2) the relatedness of the compared goods and/or services. *In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (*quoting Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) ("The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.").

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

A. The applied-for and registered marks are similar.

The registered and applied-for marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (*quoting Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En* 1772, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (*citing In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd per curiam*, 777 F. App'x 516, 2019 BL 343921 (Fed. Cir. 2019).

The test is not a side-by-side comparison, but rather a determination of whether the marks are sufficiently similar in commercial impression that confusion as to the source of the goods or services is likely. *Cai v. Diamond Hong, Inc*., 901 F.3d 1367, 1373, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (*quoting Coach Servs., Inc. v. Triumph Learning LLC,* 668 F.3d 1356, 1368, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). The focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *4 (TTAB 2020) (*citing In re Bay State Brewing Co*., 117 USPQ2d 1958, 1960 (TTAB 2016)); *In re Inn at St. John's, LLC,* 126 USPQ2d 1742, 1746 (TTAB 2018); *In re St. Helena Hosp.*, 774 F.3d 747, 750-51, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014).

The degree of similarly between the marks needed to find likelihood of confusion depends on the relatedness of the goods and services. Where, as in this case, the goods and services are identical in part, the amount of similarity between the marks declines. *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Century 21 Real Est. Corp. v. Century Life of Am*., 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.").

Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (*citing In re Dixie Rests.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. *In re Detroit Athletic Co.*, 903 F.3d at 1305, 128 USPQ2d at 1050 (*citing In re Dixie Rests*., 105 F.3d at 1407, 41 USPQ2d at 1533-34).

The mark in the application is OXELIFE in standard characters, and the registered marks are OXEHEALTH and OXEVISION, also in standard characters. The dominant portion of each mark is the identical "OXE".

The identical "OXE" is the first part of each mark. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks

in part because “VEUVE . . . remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876, 23 USPQ2d 1698, 1700 (Fed Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because “consumers must first notice th[e] identical lead word”); *see also In re Detroit Athletic Co.*, 903 F.3d at 1303, 128 USPQ2d at 1049 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”).

The identical “OXE” dominant over the additional wording in the marks. Matter that is descriptive of or generic for a party’s goods and/or services is less significant or less dominant in relation to other wording in a mark. *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1824-25 (TTAB 2015) *(citing In re Chatam Int’l Inc.*, 380 F.3d 1340, 1342-43, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004)). The additional "HEALTH" in U.S. Registration No. 6331409 means "soundness, especially of body or mind; freedom from disease or abnormality." See definition from the online American Heritage Dictionary attached to the September 24, 2021 office action, TSDR page 10. This term merely describes that registrant's goods and services are in the field of monitoring the soundness of one's body. See the identification in the registration, including software for use in the field of healthcare and for monitoring and tracking health.

Applicant’s argument that “OXE” in the applied-for mark combined with “LIFE” would result in the impression of “strong as an ox” is unpersuasive and not supported by the evidence. Marks are evaluated based on the drawing of the mark in the application and registration, and not additional information or wording that may be used in the marketplace. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (*citing In re i.am.symbolic, llc*, 866 F.3d 1315, 1324, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)). The applied-for mark is in standard characters, and does not include any reference to an ox, wording that would connotate an ox, or any design to give meaning to the wording in the mark.

The word "OXE" does not appear in the online American Heritage Dictionary and online Merriam-Webster Dictionary. See search results evidence attached to the May 28, 2023 final action, TSDR pages 256-58 and 271-72. The dictionaries do not show that “OXE” is an abbreviation, slang, or otherwise used to connote an ox or oxen. See entries for “ox” from the online American Heritage

Dictionary and online Merriam-Webster Dictionary (attached to the May 28, 2023 final action, TSDR page 254 and 265). Thus, "OXE" is an arbitrary designation, without an established meaning.

Applicant's reliance on a free dictionary entry of "(as) strong as an ox" does not show that the phrase "OXELIFE" would be associated with this idiom. Neither the referenced entry nor any of the similar listed phrases on the page include the term "OXE" or "LIFE".

Applicant claims that two registered marks show that "OXE" in the applied-for mark means "ox." U.S. Registration No. 6127002 is a stylized design of an ox head and the wording "OXE DIESEL", for motors, engine parts, powerboats, and related services. U.S. Registration No. 6217789 is "OXE BUILT LIKE A TANK STRONG AS AN OXE" for coolers and drinking tumblers. Applicant's mark does not include any reference to an ox, or a design of an ox, and is for entirely different goods and services. Thus, the meaning and impression of these marks, for entirely different goods, and including significant additional matter, cannot be ascribed to the applied-for or cited registered marks.

Even if applicant has produced evidence showing that a consumer would view the wording "OXE" as a reference to an ox, this same meaning could also be ascribed to the use of "OXE" in the registered marks, and thus create a similar impression.

Applicant also claims that "OXE" in the registrations would mean "oxygen." Again, the record is devoid of any evidence that the letters "OXE" are used as an abbreviation, reference to, or otherwise connotate "oxygen" in which "ox and "e" are separated by "yg." Further, the registered marks are in standard characters, with no additional wording or design to attribute the meaning of "oxygen" into OXEHEALTH or OXEVISION.

B. The application and registration include software that is legally identical.

The goods and services are compared to determine whether they are similar, commercially related, or travel in the same trade channels. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002).

Broadly identified software in an application or registration is presumed to encompass more narrowly identified software in an application or registration. *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *44 (TTAB 2022); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB

2015).

In this case, the registrations include software for “the monitoring and tracking of the health and safety of human beings and animals; for the monitoring and tracking of vital signs, including blood pressure, oxygen saturation levels, temperature, heart rate and breathing rate; for the monitoring and tracking of sleep in human beings and animals; for the monitoring and tracking of the movement, location and proximity of human beings and animals” that is not limited to any specific field or type of use, and thus could include use with exercise and fitness machines, and by users participating in exercise and physical training.

The function of “the monitoring and tracking of the health and safety of human beings” in the registrations could include the function of “analyzing, displaying, managing and recording statistical data, goals, information, programs and metrics” and “to assist the user with exercise and physical fitness” in the application, as statistical data, goals, information, programs and metrics are types of properties that are monitored and tracked for health purposes. See evidence from https://apps.apple.com/us/app/whoop-performance-optimization/id933944389 (December 18, 2023 denial of reconsideration, TSDR pages 110-111) showing health and fitness software application for tracking health biometrics for providing exercise recommendations and from https//www.whoop.com showing a "Health Monitor" that uses heart rate, temperature and blood oxygen data to determine overall health and for assistance with exercise and training (May 28, 2023 final action, TSDR pages 17, 32). See also evidence from https://apps.apple.com/us/app/google-fit-activity-tracker/id1433864494 showing software for health and fitness tracking that records and displays metrics including heart rate, workouts metrics and activities (December 18, 2023 denial of reconsideration, TSDR page 13-14).

The software in the application includes the function of “analyzing, displaying, managing and recording statistical data, goals, information, programs and metrics” and the software in the registrations include software for “monitoring and tracking vital signs, including blood pressure, oxygen saturation levels temperature, heart rate and breathing rate.” Registrants' software is not limited to any specific purpose or field of use, and thus could include the purpose of health and physical fitness.

The data, information and metrics in applicant’s software could include blood pressure, oxygen saturation levels, temperature, heart rate, and breathing rate. See evidence from https//www.whoop.com

showing that heart rate, temperature and blood oxygen are types of metrics tracked for assistance with exercise and training (May 28, 2023 final action, TSDR pages 17, 32). The evidence from http://www.tonal.com (May 28, 2023 final action, TSDR page 230) also shows that software for monitoring and tracking data and metrics such as heart rate and tracking movements and activity is a type of software that is used in connection with exercise machines.

Thus, the application and registration include software with functions that are legally identical.

C. The application and registration include goods that are related.

Applicant's software and services are also related to the software in the registration. The compared goods and services need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc*., 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (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 goods and/or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (*quoting 7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *44 (TTAB 2022) (*quoting In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)).

The evidence of record shows that software of the type identified in the registration, for tracking and monitoring of various health data and information, and the software identified in the application, for recording various health and exercise information and metrics for use with exercise and fitness equipment, are commonly provided together in the same channels of trade, under the same mark, and are used together:

- www.whoop.com: November 21, 2022 office action, software for recommending activity based on measured data (TSDR page 18), monitoring sleep and movement, heart rate, respiration, temperature, blood oxygen (TSDR pages 19-21); May 28, 2023 final action, software for making exercise recommendations based on heart rage, sleep and respiration (TSDR page 15, 30-31); December 18, 2023 denial of reconsideration, monitoring and recorded data used with exercise activities and machines including Assault Bike[3], Elliptical[4] and weightlifting (TSDR page 21-22)

- https://ouraring.com: November 21, 2022 office action, software for tracking sleep, temperature, heart rate and blood oxygen (TSDR pages 26-27), movement, heart rage

(TSDR page 28-29); December 18, 2023 denial of reconsideration, monitoring and recorded data used with exercise activities and machines including strength training/weight lifting and elliptical (TSDR page 60).

- www.onepeloton.com: May 28, 2023 final action, software for tracking heart rate, activity including pace and distance and workouts (TSDR page 200, 205); December 18, 2023 denial of reconsideration showing this software used with conditioning machines (TSDR page 50-51)

- www.tonal.com: May 28, 2023 final action, software for monitoring performance data including heart rate, movements, time and weight for use with strength training machine (TSDR page 230)

- www.speediance.com: December 18, 2023 denial of reconsideration, software for tracking fitness and workouts, (TSDR page 67), for use with and syncing with strength machine (TSDR page 73, 76-80, 87)

- www.maxprofitness.com: December 18, 2023 denial of reconsideration, software for data including workout reps, time, heart rate, and power (TSDR page 92, 94-95), for use with strength training machines (TSDR page 98-99)

Where evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination and noting that "[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion"); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (holding medical MRI diagnostic apparatus and medical ultrasound devices to be related, based in part on the fact that such goods have complementary purposes because they may be used by the same medical personnel on the same patients to treat the same disease).

Thus, applicant's and registrant's goods and services are considered related for likelihood of confusion purposes. *See, e.g., 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).

Applicant argues that its goods and services are not purchased casually. The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *see, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163-

64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). Further, where the purchasers consist of both professionals and the public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (*citing Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. at 1325, 110 USPQ2d at 1163), *aff'd per curiam*, 777 F. App'x 516, 2019 BL 375518 (Fed. Cir. 2019).

Applicant attempts to limit the entire scope of the cited registrations by reference to users and uses of the goods and services that apply only to some of the items in the identifications. While certain of registrant's goods are limited to a particular field, a number of items in the registrations do not contain this limitation and thus are not so limited. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1637 (TTAB 2009) (Board will not read a limitation as to a specific item in the identification of goods into other goods listed in the identification of goods). The registrations include a number of goods and services that are not limited to healthcare and patient care. U.S. Registration No. 6331409, OXEHEALTH, includes:

- downloadable software for monitoring and tracking the health and safety of human beings and animals;
- downloadable software for monitoring and tracking vital signs, including blood pressure, oxygen saturation levels, temperature, heart rate and breathing rate;
- downloadable software for monitoring and tracking sleep in human beings and animals;
- downloadable software for monitoring and tracking the movement, location and proximity of human beings and animals;
- downloadable software enabling real time status and alert services for the purpose of monitoring and tracking the activity, sleep, movement, location, proximity, health and safety of human beings and animals;
- electronic devices for monitoring and tracking the health, safety, movement, location, proximity and sleep of human beings and animals in the nature of lasers, contact sensors, non-contact sensors, temperature sensors, optical sensors, proximity sensors, pressure sensors, infrared sensors and motion sensors and radar
- Software as a service (SAAS) services featuring software for the monitoring and tracking of the health and safety of human beings and animals;
- software as a service (SAAS) services featuring software for the monitoring and tracking of vital

signs, including blood pressure, oxygen saturation levels, temperature, heart rate and breathing rate;

- software as a service (SAAS) services featuring software for the monitoring and tracking of sleep in human beings and animals;

- software as a service (SAAS) services featuring software for the monitoring and tracking of the movement, location and proximity of human beings and animals;

- software as a service (SAAS) services featuring software for providing real time status and alert services for monitoring and tracking the activity, sleep, movement, location, proximity, health and safety of human beings and animals

U.S. Registration No. 6681463, OXEVISION, includes:

- Downloadable software for monitoring and tracking the health and safety of human beings and animals in the nature of monitoring and tracking vital signs, including blood pressure, oxygen saturation levels (SP02), temperature, heart rate and breathing rate;

- Downloadable software for monitoring and tracking vital signs, including blood pressure, oxygen saturation levels (SPO2), temperature, heart rate and breathing rate;

- Downloadable software for monitoring and tracking sleep in human beings and animals;

- Downloadable software for monitoring and tracking the movement, location and proximity of human beings and animals;

- Downloadable software enabling real time status and alert services for the purpose of monitoring and tracking the activity, sleep, movement, location, proximity, health and safety of human beings and animals;

- sensing modules, namely, temperature sensors, optical sensors, proximity sensors, infrared sensors and motion sensors for cameras;

- electronic devices, apparatus and instruments for receiving, gathering monitoring, analysing, measuring, and transmitting images, information and data from cameras in the nature of lasers not for medical purposes, contact sensors, non-contact temperature, optical, proximity, pressure, infrared, and motion sensors, temperature sensors, optical sensors, proximity sensors, pressure sensors, infrared sensors and illuminators, and motion sensors and radar;

- electronic devices for monitoring and tracking the health, safety, movement, location, proximity and sleep of human beings and animals in the nature of lasers not for medical purposes, contact sensors, non-contact temperature, optical, proximity, pressure, infrared, and motion sensors, temperature sensors, optical sensors, proximity sensors, pressure sensors, infrared sensors and motion sensors and radar

- Software as a service (SaaS) services featuring software for the monitoring and tracking of the health and safety of human beings and animals;

- software as a service (SaaS) services featuring software for the monitoring and tracking of vital signs, including blood pressure, oxygen saturation levels (SP02), temperature, heart rate and breathing rate;

- software as a service (SaaS) services featuring software for the monitoring and tracking of the movement, location and proximity of human beings and animals;

- software as a service (SaaS) services featuring software for providing real time status and alert services for monitoring and tracking the activity, sleep, movement, location, proximity, health and safety of human beings and animals

The presumption under Trademark Act Section 7(b) is that the registrant is the owner of the mark and that their use of the mark extends to all goods and services identified in the registration. 15 U.S.C. §1057(b). Thus for those items in the registration that are not limited to healthcare and safety use, the presumption is that the goods and services move in all trade channels normal for such goods and services and are available to all potential classes of ordinary consumers of such goods and/or services. *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

CONCLUSION

For the foregoing reasons, the refusal to register the applied-for mark because of a likelihood of confusion with the mark in U.S. Registration Nos. 6331409 and 6681463 should be affirmed.

Respectfully submitted,

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End Notes

1. At the time of initial examination, U.S. Registration No. 6681463 was pending U.S. Application Serial No. 79303651 and not yet registered. Thus it as cited as a potentially conflicting application in the September 24, 2021 office action. Once the application was registered a Section 2(d) refusal was made.
2. Applicant has also filed appeals in co-pending U.S. Application Serial Nos. 90556053, OXEFIT for International Classes 9, 38, 41, 42 and 45 and 90556086, OXELEAD for International Class 42, both of which have been refused registration based on likelihood of confusion with U.S. Registration Nos. 6331409 and 6681463, the same cited registrations in this case.
3. See evidence from www.assualtfitness.com, December 18, 2023 denial of reconsideration (TSDR pages 24-29) showing an Assault bike is a conditioning machine.
4. See evidence from www. nordictrack.com, December 18, 2023 denial of reconsideration (TSDR pages 39-44) showing an elliptical is a conditioning machine.

United States Patent and Trademark Office (USPTO)

USPTO OFFICIAL NOTICE

Examining attorney's appeal brief has issued
on April 9, 2024 for
U.S. Trademark Application Serial No. 90556088

A USPTO examining attorney has issued an appeal brief. Follow the steps below.

(1) Read the appeal brief. This email is NOT the appeal brief.

(2) Submit reply brief within 20 days of April 9, 2024 , if you wish to do so. If submitted, a reply brief must be submitted using the Electronic System for Trademark Trials and Appeals (ESTTA) and received by the USPTO on or before 11:59 p.m. **Eastern Time** of the last day of the reply period.

(3) Direct questions about the appeal proceeding to the Trademark Trial and Appeal Board at 571-272-8500 or TTABInfo@uspto.gov.