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ESTTA Tracking number: **ESTTA1305297**

Filing date: **08/22/2023**

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

Ex Parte Appeal - Serial No.	90599769
Appellant	Thore Unlimited, LLC
Applied for mark	NOBSACTIVE
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Submission	Reply brief
Attachments	ThoreReplyAppealBrf 2023 08 22.pdf(30062 bytes)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

August 22, 2023

In re application of: Thore Unlimited, LLC

Mark: NOBSACTIVE

Serial Number: 90599769

App. Filing Date: March 24, 2021

APPLICANT'S REPLY BRIEF

This reply is provided by Applicant, which is a business venture of Glenn Thore and Whitney Way Thore, star of the long-running (10+ seasons) TLC show MY BIG FAT FABULOUS LIFE and promoter of the "NO BS: No Body Shame" messages of body acceptance and positive body image.

After Applicant's timely appeal and timely-filed March 31, 2023 brief, the Examining Attorneys' Appeal Brief (the "EA Brief") was due by May 30, 2023. That date passed without any filing. After 42 more days (on top of the original 60), a request for 30 days more time to respond was made by the Examining Attorney's Managing Attorney on July 11, 2023 and immediately granted by the Board on the same day. The Examining Attorney thus took 132 days to respond instead of the usual 60-day response period. Despite having this extraordinary period of time to try to formulate valid justifications for the refusal, the positions taken in the EA Brief are weak and internally inconsistent. They should be rejected, and the refusal reversed.

Notably, the EA Brief withdraws the citation of two of the four registrations previously cited in the final refusal and reconsideration denial. Namely, the Examining Attorney no longer cites U.S. Registration 6151637 for NOBS WELLNESS PODCAST and 5300371 for NO B.S., JUST YOGA, both of which are still "live" registrations. The Examining Attorney now cites under

2(d) only U.S. Registration Nos. 6494828 NO BS WOMEN (the "WOMEN Mark") and 6300305 NO BS WEIGHTLOSS PROGRAM (the "WEIGHTLOSS Mark"), both owned by Phit-N-Phat Personal Training, LLC (collectively, the "Phit-N-Phat Marks").

The EA Brief contends that that (A) the Applied-For NOBSACTIVE Mark and the Phit-N-Phat Marks have similar commercial impressions and (B) the goods and services offered under the marks are similar. Both contentions should be rejected, and the application should be approved to publication.

A. Similarity of the Marks

The EA Brief principally relies upon the contentions that the terms "NO BS" (in the case of the Phit-N-Phat Marks) and "NOBS" (in the case of the Applied-For Mark) are the dominant elements in each mark and that the marks are "essentially identical in appearance, sound, connotation, and commercial impression." 10 TTABVUE 6. Those assertions are wrong and not supported by the evidence in multiple respects.

First, with respect to the assertion of dominance, "No B.S." is a common phrase in general parlance. It is well-known and undisputed that the phrase is often an affirmation, attribute or characteristic of goods/services or the advertising about it as being 'no-nonsense.' For the Phit-N-Phat Marks, "NO BS" obviously plays this descriptive role (to form phrases meaning, effectively, no-nonsense women and a no-nonsense weightloss program). As such it is non-dominant. Further, while the EA Brief claims the phrase is a dominant element, it cites no marketplace or factual support either that counters the descriptive meaning or that otherwise supports of a claim of dominance.

The withdrawal of the citations of the NOBS WELLNESS PODCAST and NO B.S., JUST YOGA registrations directly supports this understanding of that the "NO BS" / "NOBS" element

is not dominant, and thus the EA Brief's claim to the contrary is internally inconsistent with its action. Indeed, the marks in each of the no longer cited registrations also use the "NO BS" element first in their marks and in connection with class 41 services in the realm of health and wellness.

The understanding that "NO BS" / "NOBS" is not dominant is also furthered by the fact that at the time the Phit-N-Phat Marks were filed on August 6, 2020 and then registered (on Sept. 21, 2021 and March 21, 2022), Applicant Thore Unlimited owned two prior (and at the time, still "live") registrations. One was a composite of NO BS, Reg. 4881469, covering goods and services in classes 25, 35 and 41 (filed June 5, 2016, registered Jan. 5, 2016, and currently still "live") (the "NO BS Logo Mark"); the other was NO BS ACTIVE, Reg. 4901018 (filed June 5, 2015, registered Feb. 15, 2016 and not cancelled until Aug. 26, 2022). *See* May 4, 2022 Response to Office Action, TSDR p. 3. The fact that both Phit-N-Phat registrations were issued, and indeed that neither received a Section 2(d) objection at all, supports the point that "NO BS" / "NOBS" is not dominant.

While the EA Brief asserts that Applicant's prior registrations are unrelated to the Phit-N-Phat Marks because the goods and services in those prior registrations are unrelated to those covered by the Phit-N-Phat Marks, that is not the case. The NO BS Logo Mark includes class 41 educational services "in the field of positive self-esteem regarding one's body," while the Phit-N-Phat Marks cover Class 41 education services in the field of weight loss/control and "health and lifestyle wellness," which could encompass or at least is related to mental wellness with respect to one's body.

Given the state of the record and the corresponding understanding of this element, it is clear that the "NO BS" / "NOBS" portion of the marks is non-dominant. Thus, the EA Brief and the currently-appealed refusal put too much significance on the purported similarity of that

element. When properly viewed with proper weights (and without the erroneous thumb on the scale due to an errant perception of dominance), and as previously argued in Applicant's opening brief, the marks as wholes are clearly different.

Second, the assertion of similarity of that initial portion of the marks is also in error. The initial portions (NO BS and NOBS) are different because of the differences in their structural composition. The Phit-N-Phat Marks clearly separates out "NO [space] B [space] S [space]." This guides Phit-N-Phat consumers into a particular reading and understanding of the phrase "No, [space] B [space] S" and creates a "no nonsense" commercial impression. In contrast, the use of "NOBS" as it appears in the Applied-For Mark is more ambiguous in its structure because there are no spaces between the letters in the term, or between the term and the word ACTIVE.

This structure leads consumers to different conclusions regarding the meaning and pronunciation of the Applied-For Mark. For example, consumers may read the term "NOBS" in the Applied-For Mark as "N [space] O [space] B [space] S [space]." Or, consumers might also understand the term as the word "Nobs," either in the context of the dictionary definition[1] or as a fanciful term (either NOBS or the whole NOBSACTIVE). It may also be understood as combination of No Body Shame and Active. Each of these readings creates very different commercial impressions from each other and the Phit-N-Phat Marks, making confusion unlikely.

Finally, when the Phit-N-Phat Marks and the Applied-For Mark are viewed in their entireties, there is even less similarity between them. The latter portions of the marks are obviously dissimilar. And the combination of the latter portions with the somewhat dissimilar first elements

[1] https://www.merriam-webster.com/dictionary/nob. The Board may take judicial notice of dictionary definitions, including "online dictionaries that exist in printed format or regular fixed editions," which were not made of record prior to appeal, and may do so either *sua sponte* or upon request of the applicant or examining attorney. TMEP § 710.01(c).

yields marks that are overall very different in sight, sound, meaning and impression. As the allegedly shared component portion is not dominant and the rest is also dissimilar, the marks are simply dissimilar on the whole.

Further, cases cited in the EA Brief do not support a refusal analysis here; they actually support approval as they demonstrate the difference between proper refusal situations and this one. For example, in *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, the Board placed great weight on the fame of the BUD mark in finding WINEBUD and BUD to be confusingly similar:

> Although consumers might well view WINEBUD as a combination of WINE and BUD, they are more likely to understand WINE as being the generic name for the beverage, and BUD, because of the fame of Opposer's mark, as the source identifying portion of the mark, *i.e.*, as showing origin in Opposer.

115 U.S.P.Q.2d 1816 (T.T.A.B. 2015) (emphasis added). And *In re Shell Oil Co.*, the court was comparing two marks with identical word portions (RIGHT-A-WAY) and similar design elements (an arrow). 992 F.2d 1204, 1206, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993).

Here, none of the marks (or components) in question have achieved the fame of BUD/BUDWEISER, as in *Anheuser-Busch*. And unlike the marks in *In re Shell Oil Co.*, none of the marks at issue here are identical in their entirety. The terms "ACTIVE," "WEIGHTLOSS PROGRAM," and "WOMEN" all have distinct meanings, appearances, and pronunciations, thus creating different commercial impressions, as discussed in Applicant's opening brief. 6 TTABVUE 10–11 (analyzing the WEIGHTLOSS Mark) and 13 (analyzing the WOMEN Mark).

In particular, the terms "ACTIVE" and "WOMEN" are not "related" under trademark law. WOMEN indicates that the goods and services offered under the WOMEN Mark are specifically meant for women, while the Applied-For Mark and the term "ACTIVE" do not have any connotation regarding gender.

And in the WEIGHTLOSS Mark, the term "WEIGHTLOSS PROGRAM" takes up the most visual space and appears in the middle of the mark; as such, the eye is naturally drawn to those words first. The Applied-For Mark, on the other hand, does not include any spaces between its terms, and the term "ACTIVE" takes up as much space as the "NOBS" element. The EA Brief does not contend, nor should it, that the terms "WEIGHTLOSS PROGRAM" and "ACTIVE" are related. Indeed, it is internally inconsistent for the EA Brief to continue to cite the Phit-N-Phat marks when the no longer cited marks, which presented "JUST YOGA" and "WELLNESS PODCAST" are no longer bars. The answer, of course, is that none of the four cited marks are bars to Applicant's Applied-For mark, as each of the marks is sufficiently different when considered on the whole.

Thus, this factor should not favor barring the Applied-For Mark from registration because the marks in their entireties create different commercial impressions.

B. Goods/Services

The EA Brief did not address the differences in the way Applicant's goods and services are marketed. As discussed in detail in Applicant's opening brief, 6 TTABVUE 13–15, Applicant's goods and services under the Applied-For Mark are marketed in such a way that consumers would not confuse the source of Applicant's goods and services with the source of weight-loss/control related goods and services because Applicant's marketing of the goods and services under the Applied-For Mark (and Applicant's other "NO BS"/ "NOBS" marks) focuses on body positivity and body acceptance, regardless of shape, size, and bodily aesthetics. Thus, the goods and services offered under the Phit-N-Phat Marks, focused on weight loss as they are, are actually in opposition to those offered under the Applied-For Mark, and so consumer confusion as to the source of those goods and services is unlikely.

C. Coexistence

In response to the unassailable fact that Applicant owned NO BS and NO BS Active composite mark registrations for years before the Phit-N-Phat Marks were registered and that there have been many years of co-existence without any conflict or confusion, the EA Brief weakly asserts that the goods and services in those prior registrations are unrelated to those covered by the Phit-N-Phat Marks. But, as addressed above, the "No BS Logo Mark" includes Class 41 educational services "in the field of positive self-esteem regarding one's body." So too, the Phit-N-Phat Marks include Class 41 education services in the field of weight loss/control and "health and lifestyle wellness." This either encompasses or is highly related to mental wellness with respect to one's body. Thus, the coexistence of the Phit-N-Phat Marks and Applicant's prior marks should not be dismissed out of hand. Instead, it must be afforded significant credit. This supports a decision that there is no likelihood of confusion bar with respect to the Applied-For Mark.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board reverse and thereby approve Applicant's application for publication.

Respectfully submitted,

s/David W. Sar/
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