

ESTTA Tracking number: **ESTTA830840**

Filing date: **07/02/2017**

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

Proceeding	91226340
Party	Plaintiff American Council on Exercise
Correspondence Address	STEVEN MASHAL AMERICAN COUNCIL ON EXERCISE 4851 PARAMOUNT DR SAN DIEGO, CA 92123 UNITED STATES Email: steven.mashal@acefitness.org
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Neil D. Greenstein
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Signature	/ndg-pto/
Date	07/02/2017
Attachments	2017-07-02-NDG-Final-Motion for Leave to File Amended Notice of Opposi- tion.pdf(96307 bytes) 2017-07-02-Final-NDG-First Amended Ace Pathway Opposition with Exhib- its.pdf(337904 bytes)

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

In the matter of Trademark Application Ser. No. 86/639,061
Published in the Official Gazette (Trademarks) on October 20, 2015
Mark: "ACE Pathway" (words only)

AMERICAN COUNCIL ON EXERCISE,

Opposer,

v.

William John Martin

Applicant.

Opposition No. 91226340

OPPOSER'S MOTION FOR LEAVE TO FILE AMENDED NOTICE OF OPPOSITION

Opposer, American Council on Exercise ("Opposer" or "ACE"), through its undersigned counsel, hereby moves the Board for an order permitting it to file an Amended Notice of Opposition pursuant to Rule 15(a) Fed. R. Civ. P., 37 C.F.R. § 2.107, and TBMP § 507.02, to include clarified allegations of *when* Opposer's mark became famous, and also to *list* specifically various goods and services associated with ACE's common-law trademark rights. These simple clarifications were suggested by the Board Interlocutory Attorney at the Discovery Conference held April 28, 2017. The case is in its initial stages, with initial disclosures exchanged May 30, 2017 and no discovery yet taken.

Opposer's counsel spoke with Applicant for a stipulation to file the amended Notice of Opposition. Applicant is acting *pro se* and stated that since he does not understand the implications he would not consent or stipulate.

The law is clear that leave to file such amendments should be freely given. Fed. R. Civ. P. 15(a), TBMP § 507.02. The Board has stated:

Amendments to pleadings should be allowed with great liberality at any stage of the proceeding where necessary to bring about a furtherance of justice, unless it is shown that entry of the amendment would violate settled law or be prejudicial to the rights of opposing parties.

OPPOSER'S MOTION FOR LEAVE TO FILE AMENDED NOTICE OF OPPOSITION

American Optical Corporation v. American Olean Tile Company, Inc., 168 U.S.P.Q. 471, 1971 WL 16428, *3 (T.T.A.B. Jan. 13, 1971).

Permitting ACE to file its Amended Notice of Opposition with simple clarifications suggested by the Board Interlocutory Attorney will benefit Applicant—not prejudice him. The case has substantively just begun and no discovery has been taken. The additional information provided in the amended pleading will assist the Applicant in discovery and efficiently resolving the case. Leave to file the Amended Notice of Opposition is thus entirely appropriate and respectfully requested. Applicant has filed herewith a signed copy of the proposed amended pleading pursuant to TBMP § 507.01.

Dated: July 2, 2017

AMERICAN COUNCIL ON EXERCISE

By: /s/ Neil D. Greenstein

Attorney for Opposer
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Encinitas, CA 92024
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **OPPOSER'S MOTION FOR LEAVE TO FILE AMENDED NOTICE OF OPPOSITION** is being served by email on July 2, 2017 upon Applicant at the following address:

William John Martin --- email: wjohnmartin@hotmail.com

Dated: July 2, 2017

/s/ /Neil D. Greenstein/

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark application Serial No. 86/639,061
Published in the Official Gazette (Trademarks) on October 20, 2015
Mark: "ACE Pathway" (words only)

AMERICAN COUNCIL ON EXERCISE)	
)	
Opposer,)	
)	
vs.)	Opposition No. 91226340
)	
William John Martin)	
)	
Applicant.)	
_____)	

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

FIRST AMENDED NOTICE OF OPPOSITION

AMERICAN COUNCIL ON EXERCISE (hereinafter "the Opposer") believes that it will be damaged by the above-referenced application by William John Martin (hereinafter "the Applicant") of the above-identified mark (ACE Pathway) and hereby opposes the same.

As grounds of opposition, and as and for its First Amended Notice of Opposition, Opposer alleges that:

1. The Applicant seeks to register ACE PATHWAY as a trademark for the following goods in International Class 032, “Bottled water, Drinking water” as is evidenced by the publication of said mark in the October 20, 2015 issue of the Official Gazette.
2. Opposer has used the marks ACE and ACE AMERICAN COUNCIL ON EXERCISE since at least as early as May 1, 1991, and has used the marks ACE and ACE AMERICAN COUNCIL ON EXERCISE in interstate commerce since at least as early as May 1, 1991 on or in connection with a wide variety of goods and services, including, without limitation, Educational Products namely, Manuals, Books, classes and seminars, on-line directories of information, research, exams, Shirts, Hats, Towels, Water Bottles, Backpacks, Mouse Pads, Cloth Cleaners, Coffee Mugs, Pens, Pencils, Lanyards, Notepads, Notebooks, Portfolios, Gym Bags, Stability Balls, Business Cards, Drinking water, Posters, Bracelets, Sweatshirts, Jackets, Measuring Tapes, Pedometers, Temporary Tattoos, Exercise Balls, Key Chains, Cups with removable lid & hole for straw, Plastic Mugs, Ceramic Mugs, Baseball caps, String backpacks, Exercise Bands, Beach Balls, Stainless Steel Water Bottle, Beverage Mugs, Cold Cup Holders, Hand-held towels, T-Shirts, Backpacks, and water containers, well before Applicant filed its Intent to Use Trademark Application on May 22, 2015.
3. Opposer is the owner and relies on U.S. Trademark Registration No. 1,898,868 (See Exhibit A) for the mark ACE (words only) for “physical fitness training manuals and printed exam materials pertaining to physical fitness; namely, combined informational brochures and applications for exams and test questions” in International Class 016 and “educational services, namely providing training such as classes and

seminars in the field of physical fitness” in International Class 041 which was registered as a trademark with the U. S. Patent and Trademark Office on June 13, 1995 and this registration has since achieved incontestable status under 15 U.S.C. Sec. 1065.

4. Opposer is the owner and relies on U.S. Trademark Registration No. 3,358,311 (See Exhibit B) for the mark ACE (words only) for “Clothing, namely, T-shirts, polo shirts, tank tops, sweat shirts, sweat pants, shorts, jackets, cover-ups and head wear” in International Class 025 which was registered as a trademark with the U. S. Patent and Trademark Office on December 25, 2007 and this registration has since achieved incontestable status under 15 U.S.C. Sec. 1065.

5. Opposer is the owner and relies on U.S. Trademark Registration No. 3,089,060 (See Exhibit C) for the mark ACE (words plus design) for “Printed matter, namely, training manuals, combined informational brochures, loose leaf magazines, exam materials, applications for exams, and sample test questions in the field of health and fitness” in International Class 016 and “Clothing, namely, t-shirts, polo shirts, tank tops, sweat shirts, sweat pants, shorts, jackets, cover-ups and head wear” in International Class 025 and “Educational services, namely, providing training services, classes, seminars, testing and on-line information and news in the field of health and fitness” in International Class 041 which was registered as a trademark with the U. S. Patent and Trademark Office on May 9, 2006, and this registration has since achieved incontestable status under 15 U.S.C. Sec. 1065..

6. Opposer is the owner and relies on U.S. Trademark Registration No. 3,190,832 (See Exhibit D) for the mark ACE (words only) for “Providing on-line information in the area of health and fitness, namely, employment placement, job listings, resume posting,

recruiting, and career networking services via a global computer network; providing on-line directory information in the area of health and fitness, namely, on-line listings for health clubs and fitness professionals” in International Class 035 (date of first use July 1, 2001) and “Scientific services, namely, research in the field of health and fitness” in International Class 042 (date of first use May 31, 2001) which was registered as a trademark with the U. S. Patent and Trademark Office on January 2, 2007 and this registration has since achieved incontestable status under 15 U.S.C. Sec. 1065.

7. Opposer is the owner and relies on U.S. Trademark Registration No. 3,244,688 (See Exhibit E) for the mark ACE (words plus design) “Printed matter, namely, training manuals, combined informational brochures, loose leaf magazines, exam materials, applications for exams, and sample test questions in the field of health and fitness” in International Class 016 and “Providing on-line information in the area of health and fitness, namely, employment placement, job listings, resume posting, recruiting, and career networking services via a global computer network; providing on-line directory information in the area of health and fitness, namely, on-line listings for health clubs and fitness professionals” in International Class 035 and “Educational services, namely, providing training services, classes, seminars, testing and on-line information and news in the field of health and fitness” in International Class 041 and “Scientific services, namely, research in the field of health and fitness” in International Class 042 which was registered as a trademark with the U. S. Patent and Trademark Office on May 22, 2007 and this registration has since achieved incontestable status under 15 U.S.C. Sec. 1065.

8. There is no issue of priority. Applicant has not yet claimed a date of first use of the mark as Applicant’s Application was filed on an Intent to Use filing basis. Opposer’s

date of first use is at least as early as May 1, 1991, and Opposer's date of first use in interstate commerce is at least as early as May 1, 1991. Opposer's use of the ACE and ACE AMERICAN COUNCIL ON EXERCISE has not been abandoned and the Registrations cited in Paragraphs 3, 4, 5, 6, 7, and 8 are valid and subsisting.

9. Opposer's valid, continuous and diverse use of the marks ACE and ACE AMERICAN COUNCIL ON EXERCISE has developed exceedingly valuable goodwill and recognition in respect to the marks ACE and ACE AMERICAN COUNCIL ON EXERCISE.

10. By virtue of its efforts and the expenditure of considerable sums for promotional materials and advertisements and the quality of its goods and services, Opposer has gained a valuable reputation for the marks ACE and ACE AMERICAN COUNCIL ON EXERCISE and these marks have acquired great value as an identification of Opposer's goods and services and the marks distinguish such goods and services from the goods and services of others.

11. If Applicant is permitted to use and register its mark as specified in the application herein opposed, confusion is likely to result because of the use of the identical term "ACE" in Applicant's mark and Opposer's marks. Therefore, it is very likely that persons familiar with Opposer's mark would assume that Applicant was associated with Opposer and any such confusion would inevitably result in damage to Opposer. Furthermore, any objection or fault found with Applicant's goods would necessarily reflect upon and seriously injure the reputation that Opposer has established under its marks. Thus, if Applicant is allowed to use and register ACE the resulting confusion and

assumed affiliation will be damaging to the Opposer's established goodwill under the marks ACE and ACE AMERICAN COUNCIL ON EXERCISE.

12. Further, if Applicant is granted the registration herein opposed, it would thereby obtain at least a prima facie exclusive right to the use of its mark thereby casting a cloud over Opposer's family of ACE and ACE AMERICAN COUNCIL ON EXERCISE marks. Applicant would also appropriate the considerable goodwill and recognition that Opposer has established through years of exclusive use and marketing. Such registration would be a source of damage and injury to Opposer.

13. Through extensive use and advertising of Opposer's marks, the marks have become famous for Opposer's goods and services since at least as early as May 21, 2015, a date prior to the filing date of Applicant's application, and prior to any use of the applied-for mark by Applicant.

14. Applicant's use, application for registration, and registration of Applicant's mark will dilute the distinctive quality of Opposer's marks within the meaning of Section 43(c) of the Trademark Act, 15 U.S.C. 1125 (c) and will lessen the ability of Opposer's marks to distinguish Opposer's goods and services regardless of the category of products or services in connection with which Applicant uses Applicant's mark.

15. Applicant has no license, consent or permission from Opposer to use or register Applicant's mark.

16. To the extent there is not a likelihood of confusion with Opposer's existing goods and services, Applicant's ACE Pathway mark is also directly within the "zone of expansion" of Opposer's marks. Opposer should be afforded a protective zone of natural market expansion against the use of Applicant's mark on any product or service which at

the time of the intervening user's appearance would reasonably be thought by the buying public to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner.

17 In addition, Opposer believes that Applicant did not have a bona fide intention to use the ACE Pathway mark in commerce for the goods specified in the Application when he filed the Application.

WHEREFORE, Opposer prays that this opposition be sustained, that application Serial No. 86/639,061 be rejected, and that registration of the mark therein sought be denied and refused.

Respectfully submitted,

By: /s/ /Neil D. Greenstein/

Attorneys for Opposer

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing First Amended Notice of Opposition is being served by email on July 2, 2017 upon Applicant at the following address:

William John Martin --- email: wjohnmartin@hotmail.com

Dated: July 2, 2017

 /s/ /Neil D. Greenstein/

EXHIBIT A

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Typed Drawing

Word Mark ACE

Goods and Services IC 016. US 038. G & S: physical fitness training manuals and printed exam materials pertaining to physical fitness; namely, combined informational brochures and applications for exams and sample test questions. FIRST USE: 19910405. FIRST USE IN COMMERCE: 19910405

IC 041. US 107. G & S: educational services, namely providing training such as classes and seminars in the field of physical fitness. FIRST USE: 19910715. FIRST USE IN COMMERCE: 19910715

Mark Drawing Code (1) TYPED DRAWING

Serial Number 74397670

Filing Date June 2, 1993

Current Basis 1A

Original Filing Basis 1A

Published for Opposition March 21, 1995

Registration Number **1898868**

Registration Date June 13, 1995

Owner (REGISTRANT) AMERICAN COUNCIL ON EXERCISE CORPORATION CALIFORNIA 4851 PARAMOUNT DRIVE SAN DIEGO CALIFORNIA 92123

Attorney of Record David P. Branfman

Type of Mark TRADEMARK. SERVICE MARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20150627.

Renewal 2ND RENEWAL 20150627

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EXHIBIT B



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ACE

Word Mark	ACE
Goods and Services	IC 025. US 022 039. G & S: Clothing, namely, T-shirts, polo shirts, tank tops, sweat shirts, sweat pants, shorts, jackets, cover-ups and head wear. FIRST USE: 19910501. FIRST USE IN COMMERCE: 19910501
Mark Drawing Code	(1) TYPED DRAWING
Trademark Search Facility Classification Code	LETTER-3-OR-MORE ACE Combination of three or more letters as part of the mark
Serial Number	76530125
Filing Date	July 7, 2003
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	October 9, 2007
Registration Number	3358311
Registration Date	December 25, 2007
Owner	(REGISTRANT) AMERICAN COUNCIL ON EXERCISE NON-PROFIT CORPORATION CALIFORNIA 4851 Paramount Drive San Diego CALIFORNIA 92123
Attorney of Record	DAVID P. BRANFMAN
Prior Registrations	1884858;1898868
Type of Mark	TRADEMARK

Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR).
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EXHIBIT C



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Word Mark	ACE AMERICAN COUNCIL ON EXERCISE
Goods and Services	(CANCELLED) IC 009. US 021 023 026 036 038. G & S: [Pre-recorded audio cassettes and video cassettes in the field of health and fitness]. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001
	IC 016. US 002 005 022 023 029 037 038 050. G & S: Printed matter, namely, training manuals, combined informational brochures, [loose leaf magazines,] exam materials, applications for exams, and sample test questions in the field of health and fitness. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001
	IC 025. US 022 039. G & S: Clothing, namely, t-shirts, polo shirts, tank tops, sweat shirts, sweat pants, shorts, jackets, cover-ups and head wear. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001
	(CANCELLED) IC 028. US 022 023 038 050. G & S: [Sporting goods, namely, exercise stability balls]. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001
	(CANCELLED) IC 035. US 100 101 102. G & S: [Providing on-line information in the area of health and fitness, namely, employment placement, job listings, resume posting, recruiting, and career networking services via a global computer network; providing on-line directory information in the area of health and fitness, namely, on-line listings for health clubs and fitness professionals]. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001
	IC 041. US 100 101 107. G & S: Educational services, namely, providing training services, classes, seminars, testing and on-line information and news in the field of health and fitness. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001
	(CANCELLED) IC 042. US 100 101. G & S: [Scientific services, namely, research in the field of health and fitness]. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001
Mark Drawing Code	(5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM
Serial Number	76530144

Filing Date July 7, 2003
Current Basis 1A
Original Filing Basis 1A
Published for Opposition February 14, 2006
Change In Registration CHANGE IN REGISTRATION HAS OCCURRED
Registration Number **3089060**
Registration Date May 9, 2006
Owner (REGISTRANT) AMERICAN COUNCIL ON EXERCISE NON-PROFIT CORPORATION CALIFORNIA
4851 Paramount Drive San Diego CALIFORNIA 92123
Attorney of Record DAVID P. BRANFMAN
Prior Registrations 1884858;1898868
Description of Mark Color is not claimed as a feature of the mark.
Type of Mark TRADEMARK. SERVICE MARK
Register PRINCIPAL-2(F)-IN PART
Affidavit Text SECT 15. PARTIAL SECT 8 (6-YR). PARTIAL SECTION 8(10-YR) 20170526.
Renewal 1ST RENEWAL 20170526
Live/Dead Indicator LIVE
Distinctiveness Limitation Statement as to "AMERICAN COUNCIL ON EXERCISE"

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ACE

Word Mark	ACE
Goods and Services	(CANCELLED) IC 009. US 021 023 026 036 038. G & S: [Pre-recorded audio cassettes and video cassettes in the field of health and fitness]. FIRST USE: 19960905. FIRST USE IN COMMERCE: 19960905
	(CANCELLED) IC 016. US 002 005 022 023 029 037 038 050. G & S: [Printed matter, namely, loose leaf magazines in the field of health and fitness]. FIRST USE: 19910405. FIRST USE IN COMMERCE: 19910405
	(CANCELLED) IC 028. US 022 023 038 050. G & S: [Sporting goods, namely, exercise stability balls]. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001
	IC 035. US 100 101 102. G & S: Providing on-line information in the area of health and fitness, namely, employment placement, job listings, resume posting, recruiting, and career networking services via a global computer network; providing on-line directory information in the area of health and fitness, namely, on-line listings for health clubs and fitness professionals. FIRST USE: 20010701. FIRST USE IN COMMERCE: 20010701
	IC 042. US 100 101. G & S: Scientific services, namely, research in the field of health and fitness. FIRST USE: 20010531. FIRST USE IN COMMERCE: 20010531
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	76978319
Filing Date	July 7, 2003
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	October 17, 2006

Change In Registration CHANGE IN REGISTRATION HAS OCCURRED

Registration Number 3190832

Registration Date January 2, 2007

Owner (REGISTRANT) AMERICAN COUNCIL ON EXERCISE NON-PROFIT CORPORATION CALIFORNIA 4851
Paramount Drive San Diego CALIFORNIA 92123

Attorney of Record DAVID P. BRANFMAN

Prior Registrations 1884858;1898868

Type of Mark SERVICE MARK

Register PRINCIPAL

Affidavit Text SECT 15. PARTIAL SECT 8 (6-YR). PARTIAL SECTION 8(10-YR) 20170222.

Renewal 1ST RENEWAL 20170222

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Word Mark	ACE
Goods and Services	(CANCELLED) IC 009. US 021 023 026 036 038. G & S: [Pre-recorded CDs and DVDs in the field of health and fitness]. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001 IC 016. US 002 005 022 023 029 037 038 050. G & S: Printed matter, namely training manuals, combined informational brochures, loose leaf magazines, exam materials, applications for exams, and sample test questions in the field of health and fitness. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001 (CANCELLED) IC 025. US 022 039. G & S: [Clothing namely, t-shirts, polo shirts, tank tops, sweat shirts, sweat pants, shorts, jackets, cover-ups and headwear]. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001 IC 035. US 100 101 102. G & S: Providing on-line information in the area of health and fitness, namely, employment placement, job listings, resume posting, recruiting and career networking services via global computer network; providing on-line directory information in the area of health and fitness, namely, on-line listings for health clubs and fitness professionals. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001 IC 041. US 100 101 107. G & S: Educational services, namely providing training services, classes, seminars, testing and on-line information and news in the field of health and fitness. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001 IC 042. US 100 101. G & S: Scientific services, namely research in the field of health and fitness. FIRST USE: 20011001. FIRST USE IN COMMERCE: 20011001
Mark Drawing Code	(5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM
Serial Number	78928195
Filing Date	July 12, 2006
Current Basis	1A

Original Filing Basis 1A

Published for Opposition March 6, 2007

Change In Registration CHANGE IN REGISTRATION HAS OCCURRED

Registration Number **3244688**

Registration Date May 22, 2007

Owner (REGISTRANT) American Council on Exercise CORPORATION CALIFORNIA 4851 Paramount Drive San Diego CALIFORNIA 92123

Attorney of Record David P. Branfman

Prior Registrations 1898868;2216241;3089060

Description of Mark The color(s) blue, white, and red is/are claimed as a feature of the mark. The mark consists of the letters A, C, and E blended together with the "A" in blue, the "C" in white and the "E" in red.

Type of Mark TRADEMARK. SERVICE MARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR). PARTIAL SECTION 8(10-YR) 20170629.

Renewal 1ST RENEWAL 20170629

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