

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: FHT Holdco LLC
SERIAL NO.: 88/489,965
MARK: FOUNTAIN
FILING DATE: June 26, 2019
INT'L CLASSES: 5, 9, 41 and 44 (as amended)
TO: Commissioner for Trademarks
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Trademark Examining Attorney
Law Office 115

RESPONSE TO OFFICE ACTION

In an Office Action issued September 17, 2019, the Examining Attorney preliminarily partially refused registration of Applicant's mark FOUNTAIN pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). The Examining Attorney also required Applicant to clarify its identification of goods and services. Applicant hereby submits the following amendments and response in support of registration.

I. AMENDMENTS TO IDENTIFICATION OF GOODS AND SERVICES

In response to the Examining Attorney's requirement that Applicant clarify the applied-for goods and services, Applicant hereby submits via the online TEAS submission system the

following amendments to its identification of goods and services:

-- *Pharmaceutical preparations and substances for the treatment of viral, metabolic, endocrine, musculoskeletal, cardiovascular, cardiopulmonary, genitourinary, sexual dysfunction, oncological, ophthalmic, respiratory, neurological, gastrointestinal, hormonal, dermatological, psychiatric and immune system related diseases and disorders [Intl. Class 05] -*

-- *Downloadable software, namely, mobile applications for use in connection with the collection, analysis, and sharing of personal medical data; **downloadable** mobile applications for use in obtaining prescription and over the counter medications and referrals to healthcare providers; Downloadable mobile applications featuring pricing information for prescription drugs and over the counter medications, for purchasing of prescription drugs and over the counter medications, and for providing information regarding health, prescription drugs and over the counter medications [Intl. Class 09] --*


-- *Providing a website featuring non-downloadable publications in the nature of blogs, magazines, brochures, and articles in the fields of pharmaceuticals, medicine, disease management, nutrition, fitness, and personal health [Intl. Class ~~35-41~~] --*

-- *Providing on-line information services in the field of wellness, nutrition, weight loss and dieting; health care services, namely, wellness programs; providing a website featuring information on health, wellness and nutrition; healthcare in the nature of health maintenance organizations; providing long-term care facilities; providing a website featuring medical information [Intl. Class ~~42-44~~] --*

II. NO LIKELIHOOD OF CONFUSION

In the Office Action, the Examining Attorney preliminarily partially refused registration of Applicant's mark FOUNTAIN for "Pharmaceutical preparations and substances for the treatment of viral, metabolic, endocrine, musculoskeletal, cardiovascular, cardiopulmonary, genitourinary, sexual dysfunction, oncological, ophthalmic, respiratory, neurological, gastrointestinal, hormonal, dermatological, psychiatric and immune system related diseases and disorders" [Intl. Class 05] and "Providing on-line information services in the field of wellness, nutrition, weight loss and dieting; health care services, namely, wellness programs; providing a website featuring information on health, wellness and nutrition; healthcare in the nature of health maintenance organizations; providing a website featuring medical information" [Intl. Class 44 (as amended)], on the ground that the mark for such goods and services is allegedly confusingly similar to the marks:

(1) FOUNTAIN (Registration No. 5,041,621) for "Beauty supplements in the nature of dietary supplements; dietary protein supplements, food supplements, health food supplements and nutritional supplements" [Intl. Class 05] ("Cited Mark 1");

(2) FOUNTAIN MD and Design () (Registration No. 5,122,650) for "Acupuncture services; Chiropractic services; Facial treatment services, namely, cosmetic peels; Health spa services, namely, cosmetic body care services; Health spa services, namely, providing weight loss programs; Laser hair removal services; Massage therapy services; Vitamin therapy; Weight management services, namely, providing weight loss and/or weight maintenance programs; Advice relating to allergies; Dentistry services in the field of teeth whitening" [Intl. Class 44] ("Cited Mark 2"); and

(3) FOUNTAIN DAY SPA (Registration No. 4,422,674) for "Health spa services for health and wellness of the body and spirit, namely, providing massage, facial and body treatment services, cosmetic body care services" [Intl. Class 44] ("Cited Mark 3," and, collectively, the "Cited Marks").

Based on the following analysis and the evidence submitted herewith, Applicant submits that there is no likelihood of confusion between its mark and the Cited Marks and respectfully requests that the Examining Attorney withdraw the preliminary refusal and approve Applicant's mark for publication.

A. The Appearances, Sounds, Connotations, & Commercial Impressions of the Marks Are Different.

Contrary to the Examining Attorney's position that Applicant's mark and the Cited Marks are confusingly similar solely because the marks feature "FOUNTAIN," Applicant respectfully submits that the significant distinctions between Applicant's mark and the Cited Marks, when properly viewed *in their entirety*, are more than adequate to distinguish the marks in the eyes and ears of relevant consumers, rendering the subject refusal untenable. See In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973); In re Bigelow, Inc., 199 U.S.P.Q. 38, 40 (T.T.A.B. 1978) (instructing each case to be decided on basis of all relevant factors).


It is well-established that, when assessing likelihood of confusion, even slight differences may be sufficient to distinguish the marks in question. The Wooster Brush Co. v. Prager Brush Co., 221 U.S.P.Q. 316 (T.T.A.B. 1986); The Land-O-Nod Co. v. Peter Paulison, 220 U.S.P.Q. 61 (T.T.A.B. 1983). The case Lever Brothers Co. v. The Barcolene Co. is instructive. There, the Court did not hesitate to find that the "obvious differences" between the marks ALL CLEAR! and ALL, both used in connection with household cleaning products, weighed against a likelihood of confusion. 463 F.2d 1107, 1109, 174 U.S.P.Q. 392, 393 (C.C.P.A. 1972). Similarly, in Colgate-Palmolive Co. v.

Carter-Wallace, Inc., the Court found that “[t]he difference in appearance and sound of the marks [PEAK and PEAK PERIOD] is too obvious to render detailed discussion necessary. In their entirety, they neither look nor sound alike.” 432 F.2d 1400, 1402, 167 U.S.P.Q. 529, 530 (C.C.P.A. 1970); see also In re Hearst Corp., 982 F.2d 493 (Fed. Cir. 1992) (finding no likelihood of confusion between use of VARGAS and VARGA GIRL on calendars); USA Network v. Gannett Co., 584 F. Supp. 195, 223 U.S.P.Q. 678, 681 (D. Colo. 1984) (finding no similarity in appearance, pronunciation, verbal translation, or suggestion of USA CABLE NETWORK and KUSA); Travelhost, Inc. v. Welcome Host of America, Inc., 1996 T.T.A.B. LEXIS 285, at *4, *9 (T.T.A.B. 1996) (finding no likelihood of confusion where TRAVEL HOST and WELCOME HOST conjured different connotations, sounds, appearances, and commercial impressions).

In addition, “[i]t is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered *as a whole* in determining likelihood of confusion.” Franklin Mint Corp. v. Master Mfg. Co., 667 F.2d 1005, 1007, 212 U.S.P.Q. 233, 234 (C.C.P.A. 1981) (emphasis added); see also In re Nat’l Data Corp., 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985) (emphasizing that a likelihood of confusion analysis “cannot be predicated on a dissection of a mark, that

is, on only part of a mark" and that "the ultimate conclusion rests on consideration of the marks in their entirety"); Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 916-17, 189 U.S.P.Q. 693, 695 (C.C.P.A. 1976) (finding no likelihood of confusion between marks when viewed in their entirety); In re Rocktron Corp., 1999 T.T.A.B. LEXIS 504, at *2-*3 (T.T.A.B. Aug. 31, 1999) (instructing marks to be considered in their entirety and not side by side).

In this case, the significant distinctions between Applicant's mark and the Cited Marks, when properly viewed *in their entirety* with respect to appearance, sound, meaning, and overall commercial impression, make clear that a finding of likelihood of confusion cannot stand. Initially, contrary to the Examining Attorney's position, the marks are entirely dissimilar in appearance. Indeed, Cited Mark 2 and Cited Mark 3 contain material not present in Applicant's marks: Cited Mark 2,

FOUNTAIN MD and Design () contains the compound term "MD," different color font, and an intricate design element, all of which do not appear in Applicant's mark; and Cited Mark 3 features the additional terms "DAY SPA," which similarly do not appear in Applicant's mark, thereby creating appearances and unique commercial impressions wholly distinct from those of Applicant's mark.

Furthermore, Applicant's mark generates an entirely different sound, emphasis, and cadence than the Cited Marks. It is well established that sound is a vital factor in the likelihood of confusion analysis. Celanese Corp. v. E. I. du Pont de Nemours & Co., 154 F.2d 143, 145, 69 U.S.P.Q. 69, 71-72 (C.C.P.A. 1946); Colgate-Palmolive Co., 432 F.2d at 1402, 167 U.S.P.Q. at 530; AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 351-52, 204 U.S.P.Q. 808, 817 (9th Cir. 1979). Applicant's mark is comprised solely of FOUNTAIN, whereas Cited Mark 2 Cited Mark 2 consists of FOUNTAIN and the two-syllable term "MD," and Cited Mark 3 consists of FOUNTAIN and the two-syllable terms "DAY SPA." These visual and aural differences alone render Applicant's mark and the Cited Marks, when properly viewed in their entireties, easily recognizable and distinguishable from one another.

Moreover, Applicant's mark and the Cited Marks convey entirely different meanings, further contributing to their distinct commercial impressions and diminishing any possibility of confusion. The use of the term "MD" in Cited Mark 2 creates an entirely different meaning and commercial impression, creating the impression of a specific doctor, as "MD" is the title for a doctor of medicine. Furthermore, the terms "DAY SPA" in Cited Mark 3 create a meaning and commercial impression that

is entirely absent from Applicant's mark. Cited Mark 3's use of "DAY SPA" after "FOUNTAIN" conveys a relaxed, stress-free environment where one can go to receive massages or get pampered. These combinations of terms in Cited Mark 2 and Cited Mark 3 have an entirely different meaning and commercial impression than the term "FOUNTAIN" standing alone, as in Applicant's mark. Consequently, Applicant's mark carries a wholly distinct connotation and conveys an appreciably different commercial impression than those of the Cited Marks. Insofar as the Examining Attorney's position turns on the mere fact that Applicant's mark and the Cited Marks feature "FOUNTAIN," that is simply not enough to support a finding of likelihood of confusion. See generally In re Electrolyte Labs., Inc., 929 F.2d 645, 647, 16 U.S.P.Q.2d 1239 (Fed. Cir. 1990) (K+ and K+EFF not likely to be confused).

As the foregoing makes exceedingly clear, there is no doubt that the marks, when properly viewed *in their entireties*, contain more than recognizable differences sufficient to create significantly distinct commercial impressions, thereby rendering Applicant's mark easily distinguishable from the Cited Marks and obviating any possibility - let alone likelihood - of confusion between the marks. Indeed, any similarity between Applicant's mark and the Cited Marks is vastly overshadowed by their

appreciable differences in appearance, sound, connotation, and overall commercial impression, thus reinforcing the conclusion that the marks are not likely to be confused in the minds of relevant consumers. This factor in the likelihood of confusion analysis, together with the abundance of analogous third-party registrations (see infra Part II.C), therefore weighs decidedly in Applicant's favor. Accordingly, Applicant respectfully requests that the Examining Attorney withdraw the preliminary refusal and pass Applicant's mark on to publication.

B. Coexistence of the Cited Marks Negate Any Likelihood of Confusion.

Moreover, the coexistence of Cited Mark 2 and Cited Mark 3 *themselves*, each of which is comprised of the identical term "FOUNTAIN," which are registered for *identical services*, and which are owned by different entities, negates a finding of a likelihood of confusion. The Examining Attorney argues that the Applicant's mark FOUNTAIN is confusingly similar to the Cited Marks FOUNTAIN MD and Design and FOUNTAIN DAY SPA because the dominant portion of the marks are similar. If this were the case, then Cited Mark 2 and Cited Mark 3 assuredly would be unable to coexist with each other since they both similarly contain the word "FOUNTAIN." Indeed, if the word "FOUNTAIN" was itself sufficient to render Applicant's mark confusingly similar

to the Cited Marks, then the mark FOUNTAIN MD and Design would necessarily have been deemed confusingly similar to the mark FOUNTAIN DAY SPA; yet both FOUNTAIN MD and Design and FOUNTAIN DAY SPA are registered, and both of these marks coexist on the Register. It follows, then, that Applicant's mark FOUNTAIN is sufficiently distinct to coexist with the Cited Marks.

C. Third-Party "FOUNTAIN"-Formative Registrations and Applications Negate Any Likelihood of Confusion.

Applicant's position against likelihood of confusion is further underscored by the concurrent existence of numerous additional third-party registrations comprised of the term "FOUNTAIN" in connection with goods and services identical or closely related to those of the Cited Marks, including without limitation the following:

Mark	Registration Number (Application Number)	Relevant Services
YOUTH FOUNTAIN	5266958	Cl. 5: Dietary food supplements; Dietary supplements; Dietary and nutritional supplements; Nutritional supplements; Vitamins
FOUNTAIN OF LIFE	2741741	Cl. 5: Nutritional and dietary supplements, and medicated face, skin, and body creams and lotions
FOUNTAIN OF YOUTH INSTITUTE	2384788	Cl. 5: Oral and sublingual anti-aging dietary supplements
VITA FONS (translates to "FOUNTAIN OF LIFE")	2015934	Cl. 5: body ointment, skin lotions and body salves all for improving one's general health and well-being; aqueous preparation for use on all types of domestic and farm animals, all for improving the animals' general health and well-being; talcum powder
WELL FOUNTAIN	(88681907) *Published for Opposition 3/24/2020*	Cl. 5: Nutritional supplements; Herbal tinctures for medical purposes; Gummy vitamins; Nutritional supplements in the form of gummies; Topical preparations, namely, topical creams, gels, salves, sprays, balms and ointments for analgesic purposes; Nutritional supplements and vitamins

Mark	Registration Number (Application Number)	Relevant Services
BUBS NATURALS FOUNTAIN OF YOUTH FORMULA	(88665992) *Published for Opposition 3/17/2020*	Cl. 5: Dietary and nutritional supplements
FIND THE FOUNTAIN OF YOU	(88591151) *Notice of Allowance 1/14/2020*	Cl. 5: Dietary supplemental drinks in the nature of vitamin and mineral beverages; Dietary and nutritional supplements; Dietetic foods and beverages adapted for medical use; Liquid nutritional supplement; Nutritionally fortified beverages for medical purposes
FOUNTAIN OV YOU	5699028	Cl. 44: Medical services, namely, providing medical spa health services, wellness programs, and evaluation, detoxification and rejuvenation procedures, in the nature of body and facial rejuvenation and intervention treatments, facials, microneedling treatments, topical infusions, laser and intense pulsed-light treatments for skin rejuvenation and hair removal, chemical peel therapy, radiofrequency treatments for skin rejuvenation, detoxification treatments, providing information and treatment recommendations concerning nutraceuticals and dietary supplements, fat reduction and body contouring treatments, skin tightening and cellulite reduction treatments, providing facial injectable treatments, botulinum toxin treatments, photo-facial treatments, laser hair removal, hair transplanting, skin resurfacing, lash and brow tinting, and wellness body treatments; Telemedicine services, namely, providing consumers with access to healthcare consultations with healthcare professionals via audio and video conferencing
THE FOUNTAINS OF HOPE	5052954	Cl. 44: Health care services, namely, wellness programs
FOUNTAIN OF YOUTH MEDI-SPA	3271613	Cl. 44: Cosmetic and plastic surgery and services; medical services including dermatology; medical spa services including cosmetic, medical, and dermatologic procedures, therapies, and treatments; health spa services, namely, cosmetic body care services; skin care salon services; hair and beauty salon services
SURGICAL WEIGHT LOSS AT FOUNTAIN VALLEY REGIONAL HOSPITAL and Design	3220033	Cl. 44: Health care and surgical services in the nature of bariatric surgery for weight loss and continued management of same
FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER	3220051	Cl. 44: Health care
FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER and Design	3796344	Cl. 44: Healthcare

Mark	Registration Number (Application Number)	Relevant Services
THE CENTER FOR BREAST CARE AT FOUNTAIN VALLEY REGIONAL HOSPITAL and Design	3796343	Cl. 44: Healthcare
LA FONT D'MEDSPA DISCOVER YOUR FOUNTAIN OF YOUTH and Design ("LA FONT" translates to "THE FOUNTAIN")	5833235	Cl. 44: Medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies
LA FONT D'MEDSPA ("LA FONT" translates to "THE FOUNTAIN")	5833234	Cl. 44: Medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies
FOUNTAIN OF YOUTH BATH	(87575919) *Notice of Allowance 4/30/2019*	Cl. 44: Beauty consultation services in the selection and use of cosmetics, fragrances, beauty aids, personal care products, and bath, body and beauty products

(See details regarding the foregoing registrations attached hereto as Exhibit A.)

A review of these third-party registrations makes clear that even slight differences between the marks distinguish them from one another. See T.M.E.P. § 1207.01(d)(iii)(Oct. 2018) ("[T]hird-party registrations may be relevant to show that a mark or a portion of a mark is . . . so commonly used that the public will look to other elements to distinguish the source of the goods or services."). To be sure, if the "FOUNTAIN" portion of these marks was alone sufficient to render them confusingly similar and the additional material in the marks were insufficient to distinguish them from one another, then they

simply would not be capable of coexisting on the Register; yet they have all registered, been issued a Notice of Allowance, or published for opposition, and they do in fact coexist. Given that the Trademark Office permitted registration of all of these directly analogous marks and that these marks and the Cited Marks peacefully coexist with one another, Applicant's mark, too, can unquestionably coexist with the Cited Marks without giving rise to consumer confusion. Accordingly, Applicant respectfully requests that the Examining Attorney withdraw the preliminary refusal and pass Applicant's mark on to publication.

D. Relevant Consumers Are Sophisticated.

A higher standard for determining likelihood of confusion is proper when the relevant buyer has expertise in the field at issue. Am. Drill Bushing Co. v. Rockwell Mfg. Co., 342 F.2d 1019, 1022 (C.C.P.A. 1965). Applicant respectfully submits that the sophistication of its consumers is such that there can be no likelihood of confusion. Applicant's goods and services are medical products and services that are marketed and sold to consumers who are highly sophisticated consumers purchasing medical goods and seeking medical services that are essential for their health and wellbeing. Such consumers are not casual consumers that make purchasing decisions hastily; rather, they are exceptionally discriminating and exercise a high degree of

care in identifying reliable and relevant medical products and services before purchasing such services. Given the vital importance of Applicant's goods and services to the health and wellbeing of Applicant's consumers, Applicant's consumers must exercise extraordinary care in selecting the appropriate medical goods and services.

The case In re Shipp is instructive. There, the Examining Attorney refused registration of the mark PURITAN for dry cleaning equipment in light of a prior mark for PURITAN for dry cleaning machine filters and dry cleaning preparations. On appeal, the Trademark Trial and Appeal Board found that, even where the marks were identical, and even where the goods were related in the sense that they were all used in the dry cleaning industry, they were not so related that they would come to the attention of the same kinds of purchasers. Therefore, confusion as to source or origin was found not to be likely. 4 U.S.P.Q.2d 1174, 1176 (T.T.A.B. 1987). Here, as in Shipp, the marks in question are used in connection with products and services in highly specialized fields. Applicant's services, as discussed supra, are medical products and services that are essential for the health and wellbeing of Applicant's consumers. Applicant's consumers are not casual public consumers making hasty decisions; rather, Applicant's consumers often first consult

directly with their physicians or Applicant's sales representatives to acquire the medical products and services that meet their specific needs.

Given the sophistication and care of the relevant consumers in their purchasing practices of Applicant's medical products and services, it would defy logic to conclude that such highly sophisticated and discriminating consumers would be likely to be confused as to the source of Applicant's medical goods and services and the goods or services offered under the Cited Marks. Indeed, it is exceedingly unlikely that *any* consumers - much less appointed agents - would confuse the Cited Marks with Applicant's mark and the respective goods and services sold thereunder. Consequently, consideration of the relevant sophisticated consumers similarly weighs decidedly against a finding of likelihood of confusion.

E. Applicant's Goods and Cited Mark 1's Goods Are Entirely Unrelated.

Furthermore, contrary to the Examining Attorney's position, no likelihood of confusion exists between Applicant's mark and Cited Mark 1 in view of the wholesale differences between Applicant's goods and the goods identified in Cited Mark 1. See In re E.I. du Pont, 177 U.S.P.Q. at 567. Initially, none of the goods identified in Applicant's application include Cited

Mark 1's beauty supplements, dietary protein supplements, food supplements, and nutritional supplements, nor are any of the goods identified in Applicant's mark, namely, pharmaceutical preparations and substances for the treatment of viral, metabolic, endocrine, musculoskeletal, cardiovascular, cardiopulmonary, genitourinary, sexual dysfunction, oncological, ophthalmic, respiratory, neurological, gastrointestinal, hormonal, dermatological, psychiatric and immune system related diseases and disorders present in Cited Mark 1. Unlike beauty supplements, food supplements, or nutritional/dietary supplements, Applicant's pharmaceutical preparations and substances are for a specific list of medical conditions, many of which are very severe. None of the goods in Cited Mark 1 include pharmaceutical preparations or substances for the treatment of specific medical conditions, including the conditions listed under Applicant's mark, nor do they include any other goods that could be deemed related to Applicant's goods.

In stark contrast to Applicant's goods, the goods under Cited Mark 1 are beauty supplements, food supplements, and nutritional/dietary supplements. These supplements are used to enhance a consumer's appearance and physique, not medicate or alleviate certain medical conditions. In fact, a review of

Registrant's specimens reveals no pharmaceutical preparations or substances being offered by the Registrant; rather, the products are all beauty or nutritional supplements. The goods under Cited Mark 1 are geared toward enhancing physical appearance through beauty supplies and nutritional supplements. Applicant's mark does not cover ***any of those goods*** or any goods related to such goods.

In light of the clear distinctions between the natures and purposes of Applicant's goods as compared to the goods for which Cited Mark 1 is registered, it is highly unlikely that relevant consumers of the respective services would erroneously believe that they emanate from the same source. Indeed, Applicant's and Registrant's respective goods are completely distinct, they are neither competitive nor complimentary, and they have nothing in common with respect to their sales appeal. Given such stark distinctions, there simply can be no possibility - let alone likelihood - of confusion among relevant consumers. This factor in the likelihood of confusion analysis therefore weighs decidedly in Applicant's favor.

F. The Extent of Potential Confusion is De Minimis.

Finally, where the scope and extent of any potential confusion is *de minimis*, as opposed to substantial, there can be no support for a refusal pursuant to Section 2(d) of the Lanham

Act. See In re E.I. du Pont, 177 U.S.P.Q. at 567. Applicant respectfully submits that where, as here, Applicant's mark and the Cited Marks differ in appearance, sound, and connotation and convey entirely distinct commercial impressions, the Cited Marks and third-party registrations coexist with one another, relevant consumers are sophisticated, and the goods offered under Applicant's mark and Cited Mark 1 are entirely unrelated, there can be little doubt that any potential confusion is *de minimis*, much less likely. Indeed, as the foregoing analysis demonstrates, consumers are simply not likely to believe that Applicant's goods and services and the goods and services in the Cited Marks emanate from the same source. All of the aforementioned distinctions between Applicant's mark and the Cited Marks necessitate a finding that the extent of potential confusion is absolutely and unequivocally *de minimis*. The mere possibility of confusion is simply too remote to justify a Section 2(d) refusal.

Accordingly, because there is no likelihood of confusion between Applicant's mark and the Cited Marks, Applicant respectfully requests that the Examining Attorney withdraw the refusal and pass Applicant's mark on to publication.

III. CONCLUSION

Whereas Applicant has satisfied the concerns and complied with the requirements of the Examining Attorney, Applicant respectfully requests that the subject refusal be withdrawn and that Applicant's mark be approved for publication.