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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Tumble Town Gymnastics, Inc.

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Serial No. 86091523

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Garland A. Brown, Jr. of Weiss Brown
for Tumble Town Gymnastics, Inc.

Tracy Whittaker-Brown, Trademark Examining Attorney, Law Office 111,
Michael Kazazian, Managing Attorney.

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Before Quinn, Bergsman, and Larkin,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Tumble Town Gymnastics, Inc. (“Applicant”) filed an application to register on the Principal Register the mark TUMBLE TOWN GYMNASTICS (in standard characters) (TUMBLE and GYMNASTICS disclaimed) for “non-competitive gymnastic instruction; educational services, namely, conducting programs for children in the field of gymnastics and physical fitness” in International Class 41.¹

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¹ Application Serial No. 86091523, filed October 15, 2013 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere and in commerce on April 1, 1995.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with Applicant's services, so resembles the previously registered mark shown below



(TUMBLE and KIDS' FITNESS disclaimed) for "children's entertainment and amusement centers, namely, interactive play areas" in International Class 41² as to be likely to cause confusion.

² Registration No. 4544347, issued June 3, 2014. The following statements appear in the registration: "The mark consists of white cloud with light blue shading at the top a clock tower with a light blue top and bottom with a pink band at the top and pink door and yellow clock face, a red school house with a yellow bell and light green doors, a purple church with pink doors, a light blue house with light green curtains with a yellow window and doors, a red fire hydrant with a yellow circle, a purple house with a red chimney and a window design in the colors light blue, light green, brown and yellow with a red door, a light green tree, a red house with yellow windows, a pink house with a light green roof with light blue shapes and a yellow chimney, windows and door. The upside down boy on the left has a brown face with black hair with red clothes and the girl on the right has a yellow face with black hair and pink clothes. The grass is light green and the entire scenery is outlined in black. The wording 'TUMBLE TOWN' appears in the rectangle below the scenery and appears in yellow with light green shading and is outlined in black and red. The wording 'THE TOP SPOT FOR KIDS' FITNESS & FUN' is in yellow and is outlined in red and appears in a purple rectangle below. The color(s) white, light blue, purple, black, pink, yellow, red, light green and brown are claimed as a feature of the mark."

When the refusal was made final, Applicant requested reconsideration. When the request for reconsideration was denied, Applicant appealed. Applicant and the Examining Attorney filed briefs.

Applicant argues that the marks are different in overall commercial impression. Applicant also argues that the services are different, asserting that its services are educational and instructional for gymnastics, while Registrant's services are focused on play for young children. Further, Applicant contends that the respective services are targeted to different customers through different trade channels, and that purchasers of the respective services are sophisticated and discriminating. Applicant submitted screenshots from Registrant's website.

The Examining Attorney maintains that the dominant portion of each mark, TUMBLE TOWN, is identical, and that the marks, when considered in their entirety, are similar. She also contends that the services are related, and that any distinctions argued by Applicant are not supported by any evidence of record. In support of the refusal, the Examining Attorney submitted third-party registrations and websites to illustrate that the services are related; and third-party websites to show that others in the trade use words like "fitness" and "fun" in connection with gymnastics.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between

the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the first *du Pont* factor dealing with the similarity of the marks, we must compare Applicant's mark with the registered mark in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *du Pont*, 177 USPQ at 567. "The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014). As more fully discussed below, because the average purchasers are parents looking for physical activities for their children, we find that the average purchasers are ordinary consumers who may exercise an enhanced degree of consumer care because they are seeking services for their children.³

Although marks must be considered in their entireties, it is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression

³ As discussed below, neither Applicant, nor the Examining Attorney, submitted any evidence regarding the degree of consumer care.

created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.”).

When considering Applicant’s mark, the words TUMBLE TOWN are dominant. Purchasers in general are inclined to focus on the first word or portion in a trademark; in Applicant’s mark, TUMBLE TOWN is the first portion. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and remembered”). *See Palm Bay Imps., Inc.*, 73 USPQ2d at 1692. Not only are these words the first portion in the mark, but the word that follows, GYMNASTICS, is generic and properly disclaimed. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (“DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE).

The same words, TUMBLE TOWN, are dominant in Registrant’s mark as well. Just as in Applicant’s mark, the words TUMBLE TOWN are the first words in the mark; moreover, the words TUMBLE TOWN are in much larger font size than the other wording in the mark. Further, in general, when wording and a design comprise the mark, then the wording is normally accorded greater weight because the wording is likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the services. *CBS, Inc. v. Morrow*, 708 F.2d 1579,

218 USPQ 198, 200 (Fed. Cir. 1983) (“in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed”); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430-31 (TTAB 2013); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). *See also Giant Food, Inc. v. Nation’s Food Serv., Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Given the prominent display of TUMBLE TOWN in large font, this wording dominates the design features of the mark.

Although we have pointed to the identical dominant portions of the marks, we acknowledge the fundamental rule in this situation that the marks must be considered in their entireties. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015). Nevertheless, it is likely that consumers, when encountering Registrant’s mark, will focus on the dominant literal portion, namely the wording TUMBLE TOWN, just as they would focus on the dominant TUMBLE TOWN portion in Applicant’s mark.

Given the commonality of the dominant wording TUMBLE TOWN in the marks, even when we factor in the disclaimers of TUMBLE, we find that the marks are similar in sound, appearance and meaning. With respect to meaning, the Examining Attorney provided examples showing third parties equating fitness and fun with gymnastics. These entities use “FITNESS and/or FUN in their names ... or to describe their services. The evidence shows that consumers associate FITNESS and FUN with GYMNASTICS.” (6 TTABVUE 8). These examples include “Fun-N-Fitness

Gymnastics”; “Summer Gymnastics Fitness Camp”; “Gymnastics, Dance, Fitness and Fun”; “Fun & Gymnastics”; and “Love Gymnastics is a fantastic place for Fitness and Fun.” (Office action, 5/27/15). In view thereof, coupled with the common knowledge that tumbling can be an aspect of gymnastics, physical fitness and simple play activities, the marks convey similar meanings.⁴

When the marks are compared in their entireties, including the additional wording in each of the marks and the design features of Registrant’s mark, we find the marks convey similar overall commercial impressions so that consumers, upon encountering the marks, are likely to be confused. This *du Pont* factor weighs in favor of a finding of a likelihood of confusion.

As to the second *du Pont* factor regarding the similarity of the services, it is well settled that the services of Applicant and Registrant need not be identical or competitive, or even be offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective services of Applicant and Registrant are related in some manner, and/or that the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). The issue here, of course, is not whether purchasers

⁴ Although both marks suggest similar meanings, the record is devoid of evidence of any third-party uses or registrations of similar marks for services of the types involved in this appeal.

would confuse the services, but rather whether there is a likelihood of confusion as to the source of these services. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

In comparing the services, we must look to the services as identified in the application and the cited registration. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014), quoting *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Applicant's recitation of services reads "non-competitive gymnastic instruction; educational services, namely, conducting programs for children in the field of gymnastics and physical fitness"; Registrant's services are identified as "children's entertainment and amusement centers, namely, interactive play areas."

The Examining Attorney's evidence bearing on the relatedness of the services includes copies of several use-based third-party registrations which individually cover, under the same mark, both types of services involved herein. (Office action, 3/24/14). "Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988). See also *In re Albert Trostel & Sons Co.*,

29 USPQ2d 1783, 1785-86 (TTAB 1993). A representative sample of the registrations includes the following:

J.W. TUMBLES

Children's entertainment and amusement centers, namely, interactive play areas; educational services, namely, providing physical fitness instruction; provision of play facilities for children
(Reg. No. 3688551)

BRIGHT CHILD

Entertainment and education services relating to children's learning activities, namely, in-person physical education, learning and activity center services for pre-school and primary age children in the form of indoor activity centers with different play areas and play equipment ... providing recreational areas in the nature of children's play areas ... providing education and play classes, namely, exercise, fitness and gymnastic instruction classes ... providing fitness, exercise, dance, recreational and sports facilities for children ... physical fitness consultation and instruction for children
(Reg. No. 3834564)

E and design

Children's entertainment and amusement centers, namely, interactive play areas ... health club services, namely, providing instruction and equipment in the field of physical exercise ... personal coaching services in the field of gymnastics, training and fitness ... physical fitness instruction ... providing gymnastic facilities ... providing recreational areas in the nature of children's play areas
(Reg. No. 3201900)

WIN KIDS

Children's entertainment and amusement centers, namely, interactive play areas ... physical fitness instruction ... providing gymnastic facilities ... providing recreational areas in the nature of children's play areas
(Reg. No. 3341847)

YOLO FIT

Educational and entertainment services for children, namely, providing interactive play areas ... physical fitness instruction

(Reg. No. 4349949)

AIRHEADS TRAMPOLINE ARENA and design

Entertainment in the nature of providing entertainment and amusement centers, namely, interactive play areas ... providing fitness instruction, classes and facilities featuring trampoline activities

(Reg. No. 3928611)

The Examining Attorney also introduced third-party websites showing that a single entity may offer under the same mark both play areas and gymnastics/fitness activities. (Office action, 11/7/14). The examples include the following:

Seattle Gymnastics Academy's Indoor Playground

At these open sessions, children ages 5 and younger have access to most of the academy's gymnastics equipment for climbing, swinging, jumping and hula-hooping; it's a great way to get their bodies moving. Kids love the enormous foam pit, trampolines and "Tumbl Trak" – a long, springy pathway that leads to a padded end.

(www.seattleschild.com)

Intensity Gymnastics & Parkour

Gymnastics & Parkour + Fun & Games

(www.intensitygymnastics.com)

Mid-Columbia Gymnastics & Cheer Tiny Tots

Join us for Indoor Playground, a playgroup for little ones and a parent. Children run, jump, bounce, play with toys and have a ball! We have loads of push & pull toys, hoops, balls, and lots of fun things for you to do with your child in a fun & active environment.

Gymnastics Gym

18,000 sq. ft. of gymnastics equipment

Push & pull toys

Huge inflatable Castle Bounce House

Trampoline for the little ones

Fun & fit activity songs at the end
(www.mcga.org)

The evidence is sufficient to establish that Applicant's and Registrant's services are related, and that, if they were rendered under similar marks, consumers would be likely to assume that they originate from a single source.⁵

As to trade channels, neither the recitation of services in the application nor the cited registration includes any limitation, so it is presumed that the services move in all normal channels of trade, including gymnasiums, health clubs, and indoor play and amusement areas. Further, as shown by the third-party websites submitted by the Examining Attorney, these services are directed to the same classes of purchasers, namely parents looking for physical activities for their children. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

The similarity in the services, trade channels and classes of purchasers are factors that weigh in favor of a finding of likelihood of confusion.

⁵ Applicant, in a feeble attempt to distinguish the services, states that it renders educational and instructional services for gymnastics, while Registrant's services are focused on play for young children. In this connection, Applicant submitted screenshots of Registrant's website in an apparent attempt to restrict the scope of Registrant's services. Suffice it to say that an applicant may not restrict the scope of the services covered in the cited registration by argument or extrinsic evidence. *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763, 764 (TTAB 1986). In any event, as shown by the other evidence of record, there is an overlap between gymnastics, physical fitness and play activities.

As to conditions of sale, Applicant claims that customers for Applicant's and Registrant's services are sophisticated buyers who exercise discrimination when purchasing the types of services involved herein. Applicant did not introduce any evidence regarding the degree of care exercised by customers in selecting gymnastic, physical fitness and play area services for children and, in any event, the recitations in the application and cited registration are unrestricted as to price point or type of customer. Even assuming that Applicant's and Registrant's services may involve a somewhat more thoughtful purchase because today's parents are more careful when it comes to choosing their children's activities, it is settled that even careful purchasers are not immune from source confusion, especially in cases such as the instant one involving similar marks and related services. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers...are not infallible."). *See also In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). We find that the similarity between the marks and the relatedness of the services rendered thereunder outweigh any purported sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and

expensive goods). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1162-63. This *du Pont* factor is neutral.

We conclude that consumers familiar with Registrant's "children's entertainment and amusement centers, namely, interactive play areas" rendered under the mark TUMBLE TOWN THE TOP SPOT FOR KIDS' FITNESS & FUN and design would be likely to believe, upon encountering Applicant's "non-competitive gymnastic instruction; educational services, namely, conducting programs for children in the field of gymnastics and physical fitness" rendered under the mark TUMBLE TOWN GYMNASTICS, that the services originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.