

ESTTA Tracking number: **ESTTA205062**

Filing date: **04/15/2008**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	DouglasC.Terry
Granted to Date of previous extension	04/16/2008
Address	2248 Cottonwood Lane Cove Salt Lake City, UT 84121 UNITED STATES

Attorney information	Matthew A. Barlow Workman Nydegger 60 East South Temple 1000 Eagle Gate Tower Salt Lake City, UT 84111 UNITED STATES mbarlow@wnlaw.com, mballard@wnlaw.com Phone:801-533-9800
----------------------	--

Applicant Information

Application No	77201578	Publication date	12/18/2007
Opposition Filing Date	04/15/2008	Opposition Period Ends	04/16/2008
Applicant	The Bodygym Corporation 16th Floor 744 Broad Street Newark, NJ 07102 UNITED STATES		

Goods/Services Affected by Opposition

Class 025. All goods and services in the class are opposed, namely: Exercise apparel, namely, sweat suits, pants, tops, shirts and jackets

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
--------------------------------------	----------------------------

Mark Cited by Opposer as Basis for Opposition

U.S. Application No.	77217108	Application Date	06/27/2007
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	BODYGYM		
Design Mark			
Description of	The mark consists of a figure with the word bodygym.		

Mark	
Goods/Services	Class 028. First use: First Use: 2003/08/00 First Use In Commerce: 2003/08/00 Exercise bars, namely, exercise devices utilizing stretchable elastic cable Class 041. First use: First Use: 2003/08/00 First Use In Commerce: 2003/08/00 Physical fitness instruction, namely, instruction in the use of exercise devices utilizing stretchable elastic cable

Attachments	77217108#TMSN.jpeg (1 page)(bytes) 001 Not. Opposition.pdf (6 pages)(34067 bytes)
-------------	---

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Matthew A. Barlow/
Name	Matthew A. Barlow
Date	04/15/2008

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

In the matter of Trademark Application Serial No. 77/201,578
Published in the Official Gazette of December 18, 2007 at TM 581
International Classes: 25
Filed: June 8, 2007
Mark: BODYGYM

DOUGLAS C. TERRY,)	Opposition No.: _____
)	
Opposer,)	
)	
v.)	NOTICE OF OPPOSITION
)	
THE BODYGYM CORPORATION.)	
)	
Applicant.)	

Opposer Douglas C. Terry (hereinafter referred to as “Terry” or “Opposer”), a an individual residing at 2248 Cottonwood Lane Cove, Salt Lake City, Utah 84121, believes that he will be damaged by registration of the mark “BODYGYM”, shown in Serial Number 77/201,578 in International Class 25, and hereby opposes same. The grounds for the opposition are that:

1. Upon information and belief, The Bodygym Corporation (“Applicant”) is a New Jersey corporation with a place of business at 744 Broad Street, 16th Floor, Newark, New Jersey 07102. Applicant seeks to register the mark “BODYGYM” (“Applicant’s Mark”) as a trademark to be used in International Class 25, as evidenced by the publication of such mark in the Official

Gazette on TM 581 of the December 18, 2007 issue, in conjunction with goods identified as “Exercise apparel, namely, sweat suits, pants, tops, shirts and jackets.”

2. Applicant filed its application for registration for such mark under 15 U.S.C. § 1051(b) on June 8, 2007, and received an application serial number of 77/210,578.

3. For many years and long prior to the effective filing date of the subject application, Opposer has been engaged in the development, manufacture and sale of a variety of exercise equipment sold in interstate commerce throughout the United States and the world, and has performed physical fitness instruction, in association with the pending application and common law mark “BODYGYM”. The goods offered and services performed by Opposer in association with such pending application and common law mark are such that the consuming public will likely be confused as to the source of the goods offered by Applicant.

4. Opposer first began using the BODYGYM mark in interstate commerce at least as early as August, 2003 and has used this mark continuously since that date.

5. Prior to the effective filing date of the subject application, Opposer has used the BODYGYM mark on goods sold and services performed in interstate commerce. Accordingly, Opposer has developed goodwill and common law rights under 15 U.S.C. § 1125(a).

6. For many years, Opposer has used the BODYGYM mark to distinguish its products and services from other goods and services of the same type, and Opposer has acquired substantial goodwill in the BODYGYM mark through use thereof.

7. Since Opposer’s adoption and initial use of the BODYGYM mark, Opposer has made a substantial investment in marketing and promoting its goods and services under this mark. Opposer has extensively used, advertised, promoted and offered for sale goods and services in association with Opposer’s BODYGYM mark with the result that Opposer’s

customers and the general public have come to know and recognize Opposer's BODYGYM mark and that the public associates this mark with Opposer and/or its goods and services. Opposer has built up extensive goodwill with the sale of goods and performance of services under the BODYGYM mark.

8. As a result of Opposer's substantial and continuous use of the BODYGYM mark in association with Opposer's goods and services, including advertising, labeling, marketing and performing, Opposer's BODYGYM mark has become an asset of substantial value to Opposer as a distinctive indication of the origin and quality of its products and services. Products bearing the Opposer's BODYGYM mark are marketed and sold throughout the United States and have acquired a broad and valuable reputation and goodwill.

9. Notwithstanding the inherent distinctiveness of Opposer's BODYGYM mark, Opposer's BODYGYM mark has also acquired secondary meaning to the public indicating Opposer as the source of goods and services bearing Opposer's BODYGYM mark.

10. Opposer is also the owner of the following relevant trademark application which is pending before the United States Patent and Trademark Office:

Application No.	Mark	Goods and Services
77/217,108	BODYGYM	Exercise bars, namely, exercise devices utilizing stretchable elastic cable (International Class 028); Physical fitness instruction, namely, instruction in the use of exercise devices utilizing stretchable elastic cable (International Class 041).

11. Opposer's BODYGYM mark is distinctive and serves as a unique designation of origin with respect to goods and services offered by Opposer.

12. Applicant's Mark is identical in spelling and sound to Opposer's common law mark BODYGYM and the literal elements of its pending application.

13. A likelihood of confusion in the marketplace exists between Opposer's BODYGYM mark, when applied to the goods and services of the respective parties and Applicant's Mark.

14. Registration of Applicant's Mark will result in damage to Opposer's trademark and Opposer's business.

15. If Applicant is permitted to register its mark for its goods as specified in the application herein opposed, such use and registration would result in confusion in the trade by reason of the similarity between Applicant's Mark and Opposer's BODYGYM mark, thereby damaging and injuring Opposer. Any such confusion may result in the loss of business to Opposer. Furthermore, any defect, objection or fault found with Applicant's goods marketed under Applicant's Mark may reflect upon and injure the reputation which Opposer has established for its goods and services in association with Opposer's BODYGYM mark.

16. 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. Such registration would be a further source of damage to Opposer.

17. In view of the foregoing, Applicant is not entitled to federal registration of its claimed mark because Applicant's Mark as used upon its identified goods is not entitled to protection. Further, Applicant does not have a right to exclusive use of said mark in commerce on Applicant's goods. Applicant's Mark, as claimed, does not and cannot function to identify such goods and to distinguish them from goods and services offered by Opposer.

WHEREFORE, Opposer prays that this opposition be sustained and that Application Number 77/201,578 be refused, and for such other and further relief at law or in equity as the

Commissioner of Patents and Trademarks shall deem necessary or appropriate under the circumstances.

The fee required under 37 C.F.R. § 2.6(17) is submitted herewith.

DATED this 15th day of April, 2008.

Respectfully submitted,

By: /Matthew A. Barlow/

Matthew A. Barlow
Michael M. Ballard (Reg. No. 54,978)
WORKMAN NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
Facsimile: (801) 328-1707

Attorneys for Opposer
DOUGLAS C. TERRY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **NOTICE OF OPPOSITION** was served on Applicant by First Class Mail, postage prepaid this 15 day of April, 2008, in an envelope addressed as follows:

The Bodygym Corporation
744 Broad Street, 16th Floor
Newark, New Jersey 07102

/Matthew A. Barlow/

J:\1703219\001 Not. Opposition.doc