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Sent: 7/27/2019 10:44:25 AM

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Subject: U.S. Trademark Application Serial No. 87509598 - AMPLIFIED YOGA - N/A - EXAMINER BRIEF

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**United States Patent and Trademark Office (USPTO)**

**U.S. Application Serial No.** 87509598

**Mark:** AMPLIFIED YOGA

**Correspondence Address:**

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**Applicant:** Donovan S. McGrath

**Reference/Docket No.** N/A

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**EXAMINING ATTORNEY'S APPEAL BRIEF**

**STATEMENT OF THE CASE**

Donovan S. McGrath ("Applicant") has appealed the trademark examining attorney's final refusal to register the applied-for mark **AMPLIFIED YOGA** for "Yoga instruction, namely, yoga classes, workshops, retreats, and teacher training classes" in International Class 41 on the ground of likelihood of confusion, mistake, or deception under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), with

the mark in U.S. Registration No. 5404498, **AMPLIFIED PILATES CENTER** for, “Pilates instruction” in International Class 41. It is respectfully requested that the refusal be affirmed.

### **FACTS**

Applicant filed this application on June 28, 2017, applying to register the mark **AMPLIFIED YOGA** in standard characters in International Class 41 on the Principal Register. On September 28, 2017, registration was refused under Section 2(d) of the Trademark Act on the ground that the mark, when used on or in connection with the identified services, so resembles the mark in Registration No. 3831711 as to be likely to cause confusion, to cause mistake, or to deceive as to the source of the services of the Applicant and registrants. Applicant was also advised of the presence of prior-filed pending U.S. Application Serial No. 87261866, which later registered under U.S. Registration No. 5404498, and prior-filed pending application 87261942, which was later abandoned by registrant. In addition the trademark examining attorney issued a disclaimer requirement for the term “YOGA”.

On January 15, 2018, Applicant submitted a response in which it entered a disclaimer for the term “YOGA” and amended its identification of services.

On February 7, 2018, the trademark examining attorney suspended the application pending registration or abandonment of U.S. Application Serial Nos. 87261866 and 87261942. The trademark examining attorney advised Applicant that the refusal under Section 2(d) because of a likelihood of confusion with U.S. Registration No. 3831711 was continued and maintained.

On October 25, 2018, the trademark examining attorney removed the application from suspension and advised Applicant that prior-filed pending application 87261866 had registered under U.S. Registration No. 5404498 and that registration was refused under Trademark Act Section 2(d) due

to a likelihood of confusion with said registration. Applicant was also advised that prior-filed pending application 87261942 was no longer a bar to registration due to abandonment.

On November 2, 2018, Applicant submitted a response to the suspension in which it argued against the likelihood of confusion refusal.

On November 29, 2018, the trademark examining attorney issued a Final Refusal in which the refusal under Section 2(d) of the Trademark Act as to U. S. Registration No. 5404498 was continued and made final. Applicant was advised that the Section 2(d) refusal as to U.S. Registration No. 3831711 was withdrawn.

On February 19, 2019, the Applicant submitted a Request for Reconsideration.

On March 12, 2019, the trademark examining attorney denied Applicant's Request for Reconsideration on the grounds that the request did not resolve all outstanding issues, and the evidence and arguments submitted were not persuasive.

### **ISSUE**

The sole issue on appeal is whether the mark, when used in connection with the identified goods and services, so resembles the mark in Registration No. 5404498 as to be likely to cause confusion, to cause mistake, or to deceive as to the source of the services of Applicant and registrant under Trademark Act Section 2(d).

### **ARGUMENT**

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a consumer would be confused, mistaken, or deceived as to the source of services of the applicant and registrant. *See* 15 U.S.C. §1052(d). Determining likelihood of confusion is

made on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). However, “[n]ot all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1366, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)). The USPTO may focus its analysis “on dispositive factors, such as similarity of the marks and relatedness of the goods [and/or services].” *In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); see TMEP §1207.01.

Because Applicant’s mark **AMPLIFIED YOGA** shares the identical first, dominant term “AMPLIFIED” with the registered mark **AMPLIFIED PILATES CENTER**, and conveys a similar commercial impression, and because the services offered by Applicant and registrant are highly related, registration of the applied-for mark is likely to create consumer confusion.

#### **A) COMPARISON OF MARKS**

##### **The Applied-For and Registered Marks Share an Identical, Dominant Term**

The applicant’s mark is **AMPLIFIED YOGA** for “Yoga instruction, namely, yoga classes, workshops, retreats, and teacher training classes” in International Class 41. The registered mark is **AMPLIFIED PILATES CENTER** for “Pilates instruction” in International Class 41.

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re*

*Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

Here, the Applicant's mark AMPLIFIED YOGA and registrant's mark AMPLIFIED PILATES CENTER share the identical, dominant first term "AMPLIFIED" in common. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because "VEUVE . . . remains a 'prominent feature' as the first word in the mark and the first word to appear on the label"); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because "consumers must first notice th[e] identical lead word"); *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 1303, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first").

Applicant's incorporation of the additional term "YOGA" does not avoid the similarity between the marks, as this wording is descriptive and has been disclaimed by applicant. Similarly, registrant has disclaimed the wording "PILATES CENTER" in its mark. Disclaimed matter that is descriptive of or generic for a party's services is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d at 1060, 224 USPQ at 752; TMEP §1207.01(b)(viii), (c)(ii).

In its response of November 2, 2018, the Applicant does not deny the similarity between the marks and argues only that the shared wording "AMPLIFIED" was diluted due to "numerous" examples of registered marks of third parties using the term "AMPLIFIED" together with what the Applicant considers related goods and/or services. *See* November 2, 2018 Response to Office Action, TSDR p. 2. To

further this argument, the Applicant submitted printed or electronic copies of third-party registrations for marks containing variations of the wording “AMPLIFIED” to support the argument that this wording is weak, diluted, or so widely used that it should not be afforded a broad scope of protection.<sup>1</sup> These registrations are for goods and/or services that are predominantly different from or unrelated to those identified in applicant’s application. See November 2, 2018 Response to Office Action, TSDR p. 11, 13-75. For instance, many are for unrelated entertainment or music related services. In the single registration for fitness instruction services, PILATES AND DANCE AMPLIFIED, the term “amplified” is transposed with other matter, changing the overall commercial impression of the marks.

In the Applicant’s Request for Reconsideration, it further argues that the wording in the mark is diluted and attached additional third-party registrations. See Request for Reconsideration 5 TTABVUE p. 7.

The weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar marks in use in the marketplace in connection with similar goods and/or services. See *Nat’l Cable Tel. Ass’n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Evidence of widespread third-party use of similar marks with similar goods and/or services “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection” in that particular industry or field. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005); see *In re Coors Brewing Co.*, 343 F.3d 1340, 1345, 68 USPQ2d 1059, 1062-63 (Fed. Cir. 2003).

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<sup>1</sup> The applicant attached a table to the Appeal Brief. This table was properly submitted to the record in the Response to Office action dated 11/02/2018.

However, evidence comprising only a small number of third-party registrations for similar marks with similar goods and/or services, as in the present case, is generally entitled to little weight in determining the strength of a mark. See *In re i.am.symbolic, llc*, 866 F.3d 1315, 1328-29, 123 USPQ2d 1744, 1751-52 (Fed. Cir. 2017); *AMF Inc. v. Am. Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973). These few registrations are “not evidence of what happens in the market place or that customers are familiar with them.” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d at 1406, 177 USPQ at 269; *In re I-Coat Co.*, 126 USPQ2d 1730, 1735 (TTAB 2018). Thus, the few similar third-party registrations submitted by applicant are insufficient to establish that the wording “AMPLIFIED” is weak or diluted.

Further, evidence comprising third-party registrations for similar marks with different or unrelated goods and/or services, as in the present case, has “no bearing on the strength of the term in the context relevant to this case.” See *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1058 (TTAB 2017) (citing *In re i.am.symbolic, llc*, 866 F.3d at 1328, 123 USPQ2d at 1751). Thus, these third-party registrations submitted by applicant are insufficient to establish that the wording “AMPLIFIED” is weak or diluted.

The Applicant states in its brief that it is using the shared term “AMPLIFIED” as a verb “referring to the action of practicing yoga to a rhythm from a musical beat, thereby manipulating and energizing ‘amplifying’ chakras or energy centers of the body”, while the registrant uses the term “AMPLIFIED” in its mark as a noun “describing a source of generic Pilates classes, as are known in the field”. See Applicant’s Brief 7 TTABVUE pp. 4-5. Here, consumers are likely to ascribe the same meaning to the term amplified in both marks because the term appears first in the marks followed by YOGA or PILATES, sharing a similar structure. The marks share an identical term which looks and sounds the same and thus conveys a similar commercial impression



Further, even if the wording “AMPLIFIED” is determined to be weak or diluted, the Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed “weak” or merely descriptive are still entitled to protection under Section 2(d) against the registration by a subsequent user of a similar mark for closely related services. TMEP §1207.01(b)(ix); *see King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (C.C.P.A. 1974); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010). As discussed below, the applicant’s and registrant’s identified services are closely related, making a finding of a likelihood of confusion appropriate in this case even if the term “AMPLIFIED” is found to be weak.

The Applicant also argues in its brief that the cited registration is a standard character mark and is therefore weak. A registration of a mark in standard characters affords the “broadest form of coverage” because it provides the registrant rights in the text itself in any possible depictions regardless of font style, size, or color. *In re Calphalon Corp.*, 122 USPQ2d 1153, 1161 n.8 (TTAB 2017) (quoting *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 1353, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011)); *see* 37 C.F.R. §2.52(a); TMEP §807.03(a). A special form drawing, however, provides limited protection for a specific depiction of the mark only. *See* 37 C.F.R. §2.52(b); TMEP §§807.04 *et seq.*

The Applicant cites two cases to bolster its argument that the cited registration is weak due to being in standard characters, *Bliss Salon Day Spa v. Interland, Inc.* and *Halo Management, LLC v. Interland, Inc.* *See* Applicant’s Brief 7 TTABVUE pp. 5. Per the Applicant, these cases show that marks which consist of a “typed drawing” are not distinctive. The examining attorney was unable to locate “*Bliss Salon Day Spa v. Interland, Inc.*” and believes this may have been an unintentional error by the Applicant. Based on the citation provided by the Applicant, it appears the Applicant may have intended to cite *Bliss Salon Day Spa v. Bliss World LLC*, 268 F.3d 494, 60 U.S.P.Q.2d 1443 (7th Cir. 2001).

It is unclear to the Examining Attorney how these cases relate to the fact in the instant case, as the Applicant did not provide much, if any, legal analysis. Assuming, arguendo, that these cases are referenced as part of the Applicant's dilution argument, there exist several distinctions between the facts of those cases and the instant case.

In *Bliss Salon Day Spa v. Bliss World LLC*, the plaintiff BLISS SALON was denied a preliminary injunction barring use of the mark BLISS WORLD by defendant. While the court ultimately determined the term "BLISS" was diluted for salons and beauty-care products, this case differs in that the plaintiff did not have a valid trademark registration for its mark. *Bliss Salon Day Spa v. Bliss World LLC*, 268 F.3d 494. This case is distinct from the instant case in that, here, the registrant holds a valid U.S. trademark registration with which there is a likelihood of confusion with the Applicant's mark, as discussed herein.

In *Halo Management, LLC v. Interland, Inc.*, a plaintiff internet provider and owner of a registered trademark for "HALO" sued a defendant competitor for use of the trademark "BLUEHALO". In that case, the defendant competitor's mark was twice rejected by the USPTO under Section 2(d) of the Trademark Act, however the defendant continued to use the mark. The plaintiff in that case was deemed to have abandoned its rights in the mark. *See Halo Mgmt., LLC v. Interland, Inc.*, 308 F. Supp. 2d 1019 (N.D. Cal. 2003). This case may be distinguished by the instant case in that the registrant in this case has not been found to have abandoned any rights associated with its service mark.

The facts at issue in each of the above cases are distinct from the facts in this case, and as a result, these cases are not persuasive.

Based on the foregoing, the applied-for and registered marks share a dominant first term and have no other distinctive or stylized features, and are therefore highly similar in sound, appearance, and commercial impression and, therefore, this factor weighs in favor of finding a likelihood of confusion.

## **B) COMPARISON OF SERVICES**

### **The Services of the Applicant and Registrant are Highly Related**

The compared goods and services need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000); TMEP §1207.01(a)(i). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

As previously stated, Applicant’s identified services are, as amended, “Yoga instruction, namely, yoga classes, workshops, retreats, and teacher training classes” in International Class 41. The registrant’s identified services are “Pilates instruction.”

The goods and services at issue are highly related because these services commonly emanate from the same commercial entity under the same mark. The trademark examining attorney previously submitted Internet evidence consisting of screenshots from websites showing providers of both yoga and Pilates instruction under the same mark, specifically, CoreStar Pilates, Fuse, and Mind the Mat Pilates & Yoga. See October 25, 2018 Office Action, TSDR pp. 8-14. The trademark examining attorney submitted additional Internet evidence showing third-parties offering yoga and pilates instruction, specifically, Balance Studio, Center Street Studios Pilates & Yoga, Energy Pilates Fitness & Yoga, Haute Bodhi, and Piyoba Studio. See November 29, 2018 Final Action, TSDR pp. 5-15.

Below is a summary of Internet evidence in the record:

- **Corestar Pilates** – offers yoga and Pilates instruction, October 25, 2018 Office Action, TSDR pp. 8-10.
- **Fuse** – offers yoga and Pilates instruction, October 25, 2018 Office Action, TSDR pp. 11-12.
- **Mind the Mat Pilates & Yoga** – offers yoga and Pilates instruction, October 25, 2018 Office Action, TSDR pp. 13-14.
- **Balance Studio Yoga** – offers yoga and Pilates instruction, November 29, 2018 Final Action, TSDR pp. 5-6.
- **Center Street Studios Pilates & Yoga** – offers yoga and Pilates instruction, November 29, 2018 Final Action, TSDR pp. 7-9.
- **Energy Pilates Fitness & Yoga** – offers yoga and Pilates instruction, November 29, 2018 Final Action, TSDR pp. 10-11.
- **Haute Bodhi** – offers yoga and Pilates instruction, November 29, 2018 Final Action, TSDR pp. 12-13.
- **Piyoba Studio** – offers yoga and Pilates instruction, November 29, 2018 Final Action, TSDR pp. 14-15.

This Internet evidence establishes that these entities commonly offer yoga and Pilates instruction under the same mark and market the services through the same trade channels.

Applicant argues in its brief that its classes are tailored to individuals who are specifically interested in “integrating music beats, energy center work...” whereas the registrant’s Pilates services are “a mass produced method and system of stretching and strengthening using a specialized machine”. See Applicant’s Brief 7 TTABVue pp. 7-8. When analyzing an applicant’s and registrant’s services for similarity and relatedness, that determination is based on the description of the services stated in the application and registration at issue, not on extrinsic evidence of actual use. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). Additionally, unrestricted and broad identifications are presumed to encompass all services of the type described. See, e.g., *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015); *In re N.A.D., Inc.*, 57 USPQ2d 1872, 1874 (TTAB 2000). The applicant’s identified yoga classes are not limited to any specific type of yoga and the identification has no restrictions as to nature, type, channels

of trade, or classes of purchasers. Therefore, it is presumed these services travel in all normal channels of trade for yoga classes, and are available to the same class of purchasers. *See Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). Similarly, registrant's Pilates services are not limited to those using machines. Thus, the specialized tailoring of applicant's yoga services pointed out by applicant in its brief fails to traverse the strong evidence showing that the *identified* yoga services are highly related to the *identified* Pilates instruction.

For the reasons specified herein, the applicant's yoga instruction and the registrant's Pilates instruction are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009).

### **Concurrent Use**

The Applicant argues that it operates in California, and the registrant in Illinois, and any operation by either party in the same state would still not support a likelihood of confusion, as other marks are allowed to "co-exist" on the Register. *See Applicant's Brief 7 TTABVUE pp. 6-7.*

Although applicant argues that its activities are geographically separate from those of registrant; however, applicant seeks a geographically unrestricted registration. The owner of a registration without specified limitations enjoys a presumption of exclusive right to nationwide use of the registered mark under Trademark Act Section 7(b), 15 U.S.C. §1057(b), regardless of its actual extent of use. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1568, 218 USPQ 390, 393 (Fed. Cir. 1983). Therefore, the prior registration is presumed to have exclusive nationwide use of its mark, and the geographical extent of applicant's and registrant's activities is not relevant in this likelihood of confusion determination.

Furthermore, the Applicant appears to misunderstand the nature of concurrent use, and the record shows that Applicant has not entered any claim of concurrent use in the instant application.

Furthermore, any concurrent use claim by the Applicant would be premature, as the application is currently under a Section 1(b) filing basis. See 37 C.F.R. §2.42(a); TMEP §1207.04(b).

### **Consumer Sophistication**

As previously discussed herein, the Applicant argues that it is “extremely unlikely that consumers would be confused between the marks when searching for their respective product” and further states that “Applicant’s classes are tailored to individuals what are specifically interested in integrating music beats, energy center work, and yoga” whereas the registrant’s Pilates services are “a mass produced method and system of stretching and strengthening using a specialized machine”. See Applicant’s Brief 7 TTABVue pp. 7-8.

To the extent that applicant is arguing that consumers of yoga classes are sophisticated, where the purchasers consist of both professionals and the public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. at 1325, 110 USPQ2d at 1163). Here, the average consumer of yoga classes and Pilates instruction includes the general public who would apply the average standard of care in purchasing the services.

Assuming, arguendo, that consumers of yoga classes or Pilates instruction are sophisticated and knowledgeable in the field of yoga and Pilates, and could distinguish these services, the applicant’s argument incorrectly requires extrinsic evidence not included in the mark for the sophisticated consumers to understand that the yoga instruction involves music beats and energy work. Finally, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); see, e.g., *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d.

1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

### Evidence of Actual Confusion

Lastly, Applicant argues that there has been no evidence of actual confusion between the marks. See Applicant's Brief 7 TTABVue p. 9. "[A] showing of actual confusion is not necessary to establish a likelihood of confusion." *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); TMEP §1207.01(d)(ii).

### CONCLUSION

The overriding concern is not only to prevent buyer confusion as to the source of the goods and services, but to protect the registrant from adverse commercial impact due to use of a similar mark by another. See *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); see *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002).

In this instance, Applicant's mark **AMPLIFIED YOGA** is likely to be confused with the registrant's mark **AMPLIFIED PILATES CENTER** because Applicant's mark creates a highly similar commercial impression to the registered mark and is used on highly related services. As such, it is likely that the applicant's mark **AMPLIFIED YOGA** and registrant's mark **AMPLIFIED PILATES CENTER** will cause consumer confusion. For the foregoing reasons, it is respectfully submitted that the refusal of registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), be affirmed.

Respectfully submitted,

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