

This Opinion is Not a
Precedent of the TTAB

Hearing: December 4, 2019

Mailed: January 7, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Donovan S. McGrath
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Serial No. 87509598
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Donovan S. McGrath, pro se.

Katherine M. Foss, Trademark Examining Attorney, Law Office 125,
Heather A. Biddulph, Managing Attorney.
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Before Taylor, Larkin, and Hudis,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Donovan S. McGrath (“Applicant”), appearing pro se, seeks registration on the Principal Register of the standard character mark AMPLIFIED YOGA (“YOGA” disclaimed) for “yoga instruction, namely, yoga classes, workshops, retreats, and teacher training classes” in International Class 41.¹

¹ Application Serial No. 87509598 was filed on June 28, 2017 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), on the basis of Applicant’s allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that the mark so resembles the registered standard character mark AMPLIFIED PILATES CENTER ("PILATES CENTER" disclaimed) for "pilates instruction" in International Class 41,² as to be likely, when used in connection with the services identified in the application, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. The appeal is fully briefed,³ and Applicant and the Examining Attorney appeared at an oral hearing before the panel on December 4, 2019. We affirm the refusal to register.

I. Record on Appeal and Evidentiary Matters⁴

The record on appeal includes the following:

- The TSDR record for the cited registration, made of record by the Examining Attorney;⁵

² Registration No. 5404498 issued on February 20, 2018.

³ Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear. Although Applicant filed a reply brief, 11 TTABVUE, it is primarily a recapitulation of Applicant's appeal brief, which is attached to the reply brief in its entirety. *Id.* at 4-11.

⁴ Citations in this opinion to the application record, including the request for reconsideration, are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

⁵ October 25, 2018 Office Action at TSDR 2-3.

- TSDR records regarding third-party registration of marks consisting of or containing the word AMPLIFIED, or an AMPLIFY- or AMPLIFIER-formative mark, for various goods and services, made of record by Applicant;⁶
- Dictionary definitions of “yoga,” made of record by the Examining Attorney,⁷ and Applicant;⁸ and a dictionary definition of “pilates,” made of record by Applicant;⁹
- Internet webpages reflecting the offering of pilates instruction and yoga instruction under the same mark or business name, made of record by the Examining Attorney;¹⁰ and
- TSDR records regarding third-party registrations of marks sharing a common word that are registered for both pilates-related services and yoga-related services (e.g., PILATES HAVEN and YOGA HAVEN, SANCTUARY PILATES and SANCTUARY),¹¹ and registrations of marks containing AMPLIFIED for pilates-related services and yoga-related goods and services (primarily Applicant’s registrations of and published applications

⁶ January 15, 2018 Response to Office Action at TSDR 2-61; November 2, 2018 Response to Office Action at TSDR 7-39.

⁷ September 28, 2017 Office Action at TSDR 10.

⁸ January 15, 2018 Response to Office Action at TSDR 76; February 19, 2019 Request for Reconsideration at TSDR 73.

⁹ February 19, 2019 Request for Reconsideration at TSDR 74.

¹⁰ October 25, 2018 Office Action at TSDR 4-10; November 29, 2018 Final Office Action at TSDR 2-12.

¹¹ November 2, 2018 Response to Office Action at TSDR 40-50; February 19, 2019 Request for Reconsideration at TSDR 10-53.

to register AMPLIFIED YOGA for other goods and services),¹² made of record by Applicant.

The Examining Attorney also placed into the application record multiple “Notation to File” entries reflecting email correspondence, voicemails, and telephone conferences between Applicant and the Examining Attorney.¹³ The first such entry includes an email from Applicant to the Examining Attorney in which Applicant represented that he had “registered 8 trademarks that were initially refused based on likelihood of confusion with mark 5404498.”¹⁴ Applicant repeated that representation in a later email in the chain that is in the first Notation to File entry,¹⁵ and made a similar representation to the panel at the oral hearing.

In her correspondence with Applicant in the Notation to File entries, and at the oral hearing, the Examining Attorney did not dispute that the seven published applications to register AMPLIFIED YOGA for which TSDR pages were made of record during prosecution have since matured into registrations.¹⁶ Because Applicant and the Examining Attorney do not dispute that these registrations have issued, and because the Examining Attorney addressed them at the oral hearing, we will treat

¹² November 2, 2018 Response to Office Action at TSDR 51-69; February 19, 2019 Request for Reconsideration at TSDR 54-73.

¹³ There is one such entry on May 24, 2019 and 13 such entries on September 5, 2019.

¹⁴ May 24, 2019 Notation to File at TSDR 1 (April 24, 2019 email from Applicant to the Examining Attorney).

¹⁵ *Id.* (May 13, 2019 email from Applicant to the Examining Attorney).

¹⁶ February 19, 2019 Request for Reconsideration at TSDR 57-72.

the TSDR records of these registrations as if they were of record, and we consider them for whatever probative value they may have.¹⁷

Finally, after Applicant filed his appeal brief, he filed a document captioned “Supplemental Brief,” 9 TTABVUE, which is not a brief at all, but rather contains TSDR pages for various “pairs” of third-party registrations of marks containing common elements for yoga and pilates services (e.g., E YOGA and E-PILATES, STICK YOGA and PILATESSTICK). *Id.* at 2-41. Applicant did not make these registrations of record during prosecution, but the Examining Attorney did not object in her brief to this untimely evidence and she stated at the oral hearing that she had considered it, so we will also consider the registrations for whatever probative value they may have.¹⁸

II. Analysis of Likelihood of Confusion Refusal

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C.

¹⁷ The first September 5, 2019 entry also contains links to videos of Applicant’s rendition of his yoga instruction services. First September 5, 2019 Notation to File entry at TSDR 1 (April 24, 2019 email from Applicant to the Examining Attorney). Because the information displayed at a link’s Internet address can be changed or deleted, merely providing a link to a website is insufficient to make information from that site of record. *See, e.g., In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013); *In re HSB Solomon Assocs. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012). Notably, the links are now inoperative and Applicant did not otherwise make the videos of record.

¹⁸ We therefore exercise our discretion to accept the registrations, and we do so given the unusual circumstances of this case (that is, the express lack of objection by the Examining Attorney, while noting the admonition of Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), that “[t]he [evidentiary] record in the application should be complete prior to the filing of an appeal.”

§ 1052(d). Our determination of likelihood of confusion under § 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Two key factors in every § 2(d) case are the first two *DuPont* factors regarding the similarity or dissimilarity of the marks, and the similarity or dissimilarity of the goods or services, because the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Applicant never cites *DuPont* or any case from the Court of Appeals for the Federal Circuit, the Court of Customs and Patent Appeals, or the Board. Instead, he relies on infringement cases from regional circuit courts and federal district courts, which do not govern the Board’s registrability determinations. Applicant cites these cases in the course of his discussion of likelihood of confusion under infringement factors corresponding to the first two *DuPont* factors, 7 TTABVUE 4-6, the fourth *DuPont* factor regarding the conditions under which and the buyers to whom the services are sold, *id.* at 7-8, the sixth *DuPont* factor regarding the number and nature of similar marks in use with similar services, *id.* at 8-9, the eighth *DuPont* factor regarding the absence of evidence of actual confusion, *id.* at 9, the eleventh *DuPont* factor regarding the extent to which the registrant has the right to exclude others from the use of its

mark, *id.*, and the twelfth *DuPont* factor regarding the extent of potential confusion. *Id.* The record also contains evidence relevant to the thirteenth *DuPont* factor, which “relates to ‘any other established fact probative of the effect of use.” *In re Strategic Partners, Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012) (quoting *DuPont*, 177 USPQ at 567). Despite Applicant’s failure to cite and discuss controlling law, we will consider his arguments and evidence within the *DuPont* framework.

A. The Number and Nature of Similar Marks in Use on Similar Services

We begin with the sixth *DuPont* factor, which “considers the number and nature of similar marks in use on similar goods.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567), because it potentially impacts our analysis of the similarity of the marks. “The purpose of introducing evidence of third-party use is ‘to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Id.* (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (internal quotation and quotation marks omitted)). “Third-party use is also ‘relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.’” *Id.* (quoting *Palm Bay Imps.*, 73 USPQ2d at 1693). “In determining the strength or weakness of a mark, we consider both its inherent strength based on the nature of the term itself and its commercial strength based on use in the

marketplace.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017).¹⁹

Applicant argues that “there are over 60 active registrations that co-exist with AMPLIFIED as part of their Mark, as well as, 11 Registrations within the same field IC Class IC 041 (services),” such that the “Cited Registration is a weak mark.” 7 TTABVUE 8. Applicant argues that even if the cited mark “rates on the spectrum of marks deserving more protection, marketplace recognition must be considered,” *id.*, and he argues that it is missing here because the cited mark is not a “household name[]” or a strong trademark. *Id.*

The Examining Attorney responds that Applicant has submitted a relatively small number of third-party registrations and no evidence of third-party use, and has failed to show that the word AMPLIFIED that is common to the two involved marks is weak or diluted, 10 TTABVUE 8, and that even if the cited mark is considered to be weak, it is nonetheless entitled to protection under Section 2(d) given the similarity of the marks and the services. *Id.* at 9.

Applicant focuses almost entirely on the cited mark’s alleged lack of commercial strength.²⁰ He surmises about the registrant’s lack of advertising resources and its

¹⁹ Applicant cites a federal district court case, *Source Servs. Corp. v. Source Telecomputing Corp.*, 635 F. Supp. 600 (N.D. Ill. 1986), for essentially the same proposition. 7 TTABVUE 8.

²⁰ Applicant does not appear to dispute the mark’s conceptual strength. 7 TTABVUE 8. The mark “is registered on the Principal Register [and] is entitled to all Section 7(b) presumptions, including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the [services].” *Tea Bd. of India v. The Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). The AMPLIFIED PILATES CENTER mark must be presumed to be inherently

failure to give the cited mark nationwide exposure sufficient to make it a “household name[],” 7 TTABVUE 8,²¹ but provides no supporting evidence. He also provides no evidence of use of any third-party AMPLIFIED-formative marks, including those in the third-party registrations in the record. This severely undercuts Applicant’s claim that the cited mark lacks “marketplace recognition,” *id.*, because “[a]s to *commercial* weakness, [t]he probative value of third-party trademarks depends entirely upon their usage.” *Tao Licensing*, 125 USPQ2d at 1058 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1693).

The numerous third-party registrations that Applicant made of record are “not evidence of what happens in the market place or that customers are familiar with them.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, (Fed. Cir. Sept. 13, 2019) (quoting *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973)). “Nevertheless, in determining the degree of weakness, if any, in the shared term[] [AMPLIFIED], we must ‘adequately account for the apparent force of [third-party use and registration] evidence, regardless of whether ‘specifics’ pertaining to the extent and impact of such use has been proven.” *Id.* (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015)). Accordingly, we will review the registrations to determine their probative value, if any, on the issue of the strength of the cited mark

distinctive because only a disclaimer of PILATES CENTER, not a showing of acquired distinctiveness under Section 2(f), was required for registration.

²¹ There is no requirement that a mark be a “household name” to receive protection under Section 2(d) because “even weak marks are entitled to protection against confusion.” *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

and the ability of consumers to distinguish between the AMPLIFIED-formative marks here based on other elements in the marks.

Third-party registrations that do not cover the same or similar services as those in the cited registration “have limited probative value.” *Id.* (citing *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017)); *cf. Omaha Steaks*, 128 USPQ2d at 1695 (third-party uses on unrelated goods had “no real probative value” regarding weakness of the opposer’s marks). All but one of the AMPLIFIED-formative registrations made of record by Applicant are in this category. Registrations of AMPLIFIED for a continuing car audio reality show broadcast over various media and the production of the show;²² LIVE & AMPLIFIED for various entertainment services regarding music and sports;²³ POP CULTURE AMPLIFIED for providing information, news, and commentary in various popular culture fields;²⁴ AMPLIFIED RECORDS for CDs and DVDs featuring music;²⁵ WINE AMPLIFIED for conducting exhibitions in the nature of wine tastings and festivals;²⁶ AMPLIFIED SOUL for various counseling, coaching, and information services regarding personal

²² January 15, 2018 Response to Office Action at TSDR 2-3. Each registration was made of record multiple times by Applicant, which was unnecessary and distracting. We will cite only to each registration’s first appearance in the record.

²³ *Id.* at TSDR 4-6.

²⁴ *Id.* at TSDR 7-13.

²⁵ *Id.* at TSDR 25-26. This registration was cancelled in 2014 for failure to prove continued use of the mark. *Id.* at TSDR 25. “The existence of a cancelled registration—particularly one cancelled for failure to provide a declaration of continued use—does not tend to show that the cited mark is weak due to third-party use.” *Inn at St. John’s*, 126 USPQ2d at 1745.

²⁶ *Id.* at TSDR 33-35.

development and self-improvement;²⁷ INTELLIGENCE AMPLIFIED for educational, informational, and research services regarding investing and finance;²⁸ AMPLIFIED DYNAMICS for education services in the field of healthcare;²⁹ and LIVING AMPLIFIED for jewelry, retail sales of jewelry, and coaching services in the fields of wellness and health,³⁰ tell us next to nothing about the ability of consumers to distinguish AMPLIFIED YOGA for yoga instruction services and AMPLIFIED PILATES CENTER for pilates instruction. *i.am.symbolic*, 123 USPQ2d at 1751; *Inn at St. John's*, 123 USPQ 2d at 1745.³¹

Applicant also made of record a registration of PILATES AND DANCE AMPLIFIED for services that include “providing instruction and equipment in the field of physical exercise,”³² which would appear to encompass the services identified in the cited registration. Applicant argues in his reply brief that “even a ‘small number’ or plurality of related service marks are enough to diminish the strength of an asserted mark, and contends that it is certainly more than deminimis [sic] in

²⁷ *Id.* at TSDR 52-53.

²⁸ *Id.* at TSDR 54-56.

²⁹ *Id.* at TSDR 57-58.

³⁰ *Id.* at TSDR 59-61.

³¹ The record contains additional third-party registrations of “AMPLIFY”- and “AMPLIFIER”-formative marks for various goods and services. January 15, 2018 Response to Office Action at TSDR 14-24, 27-32, 36-51. These registrations have even less probative value than the AMPLIFIED-formative registrations on the weakness of the word AMPLIFIED. *Inn at St. John's*, 126 USPQ2d at 1746 & n.14.

³² February 19, 2019 Request for Reconsideration at TSDR 54-56. The Examining Attorney initially refused registration of Applicant’s mark based on this registration, September 28, 2017 Office Action at TSDR 1-4, but subsequently withdrew that refusal. November 29, 2018 Final Office Action at TSDR 1.

weakening the strength of the cited registration,” 11 TTABVUE 3, but a single third-party registration “is a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both” *Juice Generation* and *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millenium Sports. S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed Cir. 2015). *Inn at St. John’s*, 126 USPQ2d at 1746. In the absence of evidence of the nature, duration, and extent of the use of the PILATES AND DANCE AMPLIFIED mark, we cannot find that this one registration establishes that the word AMPLIFIED is weak for fitness-related services. *Id.* (finding that “four third-party registrations of varying probative value (two for non-identical services and the other two for non-identical terms)” did not establish the weakness of the cited mark). On this record, we find that the sixth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

B. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). “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 White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)).

The proper test regarding similarity “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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citations omitted).³³

The AMPLIFIED YOGA and AMPLIFIED PILATES CENTER marks are identical in structure, as each begins with the word AMPLIFIED followed by non-source identifying matter. The marks must be considered in their entireties, but “in articulating reasons for reaching a conclusion on the issue of confusion, 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.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). The word AMPLIFIED is the first part of both marks, and that “is particularly significant because consumers typically notice those words first.” *Id.* at 1049 (citing *Palm Bay Imps.*, 73 USPQ2d at 1692). *See also Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (marks CENTURY 21 and CENTURY LIFE OF

³³ As discussed below in connection with the second *DuPont* factor, the “average consumer” of both yoga instruction and pilates instruction is a member of the general public.

AMERICA found to be confusingly similar in part because “upon encountering each mark, consumers must first notice [the] identical lead word” CENTURY). The words YOGA and PILATES CENTER that follow AMPLIFIED in the respective marks have been disclaimed and have little or no source-identifying capacity because they name or refer to the respective yoga and pilates instruction services. *See, e.g., In re Dixie Rests.*, 105 F.3d 1405, 41 UPSQ2d 1531, 1533-34 (Fed. Cir. 1997) (holding that Board properly found that DELTA, not CAFE, was the dominant portion of the mark THE DELTA CAFE for restaurant services). Accordingly, we agree with the Examining Attorney that AMPLIFIED is the dominant portion of both marks, 10 TTABVUE 6, and we turn to the required comparison of the marks in their entirety, giving greater weight in that comparison to the word AMPLIFIED than to the other elements of the marks.

Applicant does not address the similarity of the marks in appearance and sound, 7 TTABVUE 4-6; 11 TTABVUE 3-4,³⁴ thus effectively conceding that the marks are similar in these means of comparison. Although there are differences in sound and appearance resulting from the presence of the YOGA and PILATES CENTER suffixes in the marks, we find that the marks are more similar than dissimilar in appearance

³⁴ Applicant argues that “the Cited Registration is a Standard Character type mark,” which he appears to claim makes the mark less distinctive and weaker. 7 TTABVUE 5. We agree with the Examining Attorney that 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,” 10 TTABVUE 9 (quoting *In re Calphalon Corp.*, 122 USPQ 1153, 1161 n.8 (TTAB 2017) (internal quotation omitted)), and that the non-binding authorities cited by Applicant are not to the contrary. *Id.* at 10.

and sound due to the common presence in the marks of the identical dominant first word AMPLIFIED.

Applicant argues only that there are differences in the marks' connotations and commercial impressions, claiming that each "use of the word 'amplified' is different," 7 TTABVue 4, and that the word means one thing in the cited mark and something different in his mark. According to Applicant, "Amplified, as used by the Cited Registration, is a noun describing a source of generic Pilates classes, as are known in the field," while "Amplified, as used by the Applicant, is 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." *Id.* at 4-5. Applicant's argument is grammatically incorrect and unsupported by the record.

Although "amplified" is the past tense of the verb "amplify," which means, *inter alia*, "to make larger or greater (as in amount, importance, or intensity),"³⁵ in the marks AMPLIFIED YOGA and AMPLIFIED PILATES CENTER, the word functions not as a noun or a verb, but rather as an adjective modifying YOGA and PILATES CENTER, respectively. In its adjective form, "amplified" means that the noun that it modifies is "greater . . . in amount, importance, or intensity" than it ordinarily is. We must consider the meaning of the marks in the context of the broadly identified "yoga instruction" services in the application and the broadly identified "pilates instruction"

³⁵ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on January 7, 2020). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *See, e.g., Ricardo Media, Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, *6 n.8 (TTAB 2019).

services in the cited registration, *i.am.symbolic*, 123 USPQ2d at 1748-49, and in that context, the adjective AMPLIFIED connotes yoga and pilates instruction that is “greater in amount, importance, or intensity” than ordinary instruction.

The record does not support Applicant’s claim that AMPLIFIED would be viewed in his mark as having a different, *sui generis* meaning “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.” 7 TTABVUE 4-5. That might be the case if his identification of “yoga instruction services” were specifically limited to “instruction in practicing yoga to a rhythm from a musical beat, thereby manipulating and energizing ‘amplifying’ chakras or energy centers of the body,” but as discussed below in connection with the second *DuPont* factor, his broad “yoga instruction services” identification must be presumed to include “all of the [services] of the nature and type described therein,” *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006), which the record shows includes many types of yoga instruction and yoga classes in addition to Applicant’s own.

We find that in the context of the broadly identified services in the application and cited registration, the dominant adjective AMPLIFIED will be understood in each mark in its dictionary sense, such that the marks AMPLIFIED YOGA and AMPLIFIED PILATES CENTER both connote a form of fitness instruction that is “greater in amount, importance, or intensity” than ordinary forms of instruction. The non-source identifying suffix elements YOGA and PILATES CENTER “are unlikely to change the overall commercial impression engendered by the marks,” *Detroit*

Athletic Co., 128 USPQ2d at 1049, and indeed may signal that the provider of pilates instruction under the AMPLIFIED PILATES CENTER mark has line extended into yoga instruction, or that the provider of yoga instruction under the AMPLIFIED YOGA mark has opened a center for pilates instruction. The marks as a whole are similar in connotation and commercial impression.

We find that the marks are quite similar in appearance, sound, connotation, and commercial impression when considered in their entireties, and the first *Du Pont* factor supports a finding of a likelihood of confusion.

C. Similarity or Dissimilarity of the Services and Channels of Trade

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567), while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* (quoting *DuPont*, 177 USPQ at 567). Our analysis under these factors is based on the identifications of services in the application and the cited registration. *Id.*; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014).

It is “not necessary that the [services] be identical or even competitive to support a finding of a likelihood of confusion.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). “[L]ikelihood of confusion can be found ‘if the respective [services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise

to the mistaken belief that they emanate from the same source.” *Id.* (quoting 7-*Eleven*, 83 USPQ2d at 1724).

The services identified in the application are “yoga instruction, namely, yoga classes, workshops, retreats, and teacher training classes.” The Examining Attorney made of record the following definition of “yoga”:

The term Yoga comes from a Sanskrit word which means yoke or union. Traditionally, yoga is a method joining the individual self with the Divine, Universal Spirit, or Cosmic Consciousness. Physical and mental exercises are designed to help achieve this goal, also called self-transcendence or enlightenment. On the physical level, yoga postures, called *asanas*, are designed to tone, strengthen, and align the body. These postures are performed to make the spine supple and healthy and to promote blood flow to all the organs, glands, and tissues, keeping all the bodily systems healthy. On the mental level, yoga uses breathing techniques (*pranayama*) and meditation (*dyana*) to quiet, clarify, and discipline the mind. However, experts are quick to point out that yoga is not a religion, but a way of living with health and peace of mind as its aims.³⁶

As shown in the record, including in the webpages reproduced below, there are many forms of yoga and thus many forms of yoga instruction. Applicant argues that he “teaches a very specific form of enhanced yoga,” 7 TTABVUE 5, which he describes as “yoga enhanced with rhythm from a musical beat, thereby manipulating and

³⁶ September 28, 2017 Office Action at TSDR 10 (THE FREE DICTIONARY). Applicant made of record a definition of “YOGA” as “(capitalized): a Hindu theistic philosophy teaching the suppression of all activity of body, mind, and will in order that the self may realize its distinction from them and attain liberation.” January 15, 2018 Response to Office Action at TSDR 76; February 19, 2019 Request for Reconsideration at TSDR 73 (MERRIAM-WEBSTER DICTIONARY). We find that the Examining Attorney’s definition is more useful in understanding the meaning of the word “yoga” as it appears in the identification of services in the application.

energizing ‘amplifying’ chakras or energy centers of the body.” *Id.* at 6.³⁷ Applicant’s identification of services, however, broadly describes his services as “yoga instruction” that is not limited to his or any other specific form of yoga. Because Applicant’s “services are not limited [they] must be construed to encompass all types of [yoga instruction] services,” *In re Binion*, 93 USPQ2d 1531, 1535 (TTAB 2009), not just those offered by Applicant. *See also Jump Designs*, 80 USPQ2d at 1374. Applicant cannot rely on extrinsic evidence of his actual use of the mark to limit the scope or subject matter of his “yoga instruction services” to “a very specific form of enhanced yoga” where his identification of services contains no such limitation. *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

The services identified in the cited registration are “pilates instruction.” “Pilates” is “an exercise regimen that is typically performed on a floor mat or with the use of specialized apparatus and aims to improve flexibility and stability by strengthening the muscles and especially the torso-stabilizing muscles of the abdomen and lower back.”³⁸ As with yoga, the record shows that there are many forms of pilates and like Applicant’s identification of services, the registrant’s identification of services is not limited and also must be deemed to include all forms of “pilates instruction.”

Applicant argues that “the services themselves differ tremendously” because “Applicant’s mark is for an enhanced or ‘amplified’ form of yoga,” while the “Cited

³⁷ Applicant claimed at the oral hearing that his particular form of yoga was new and unique.

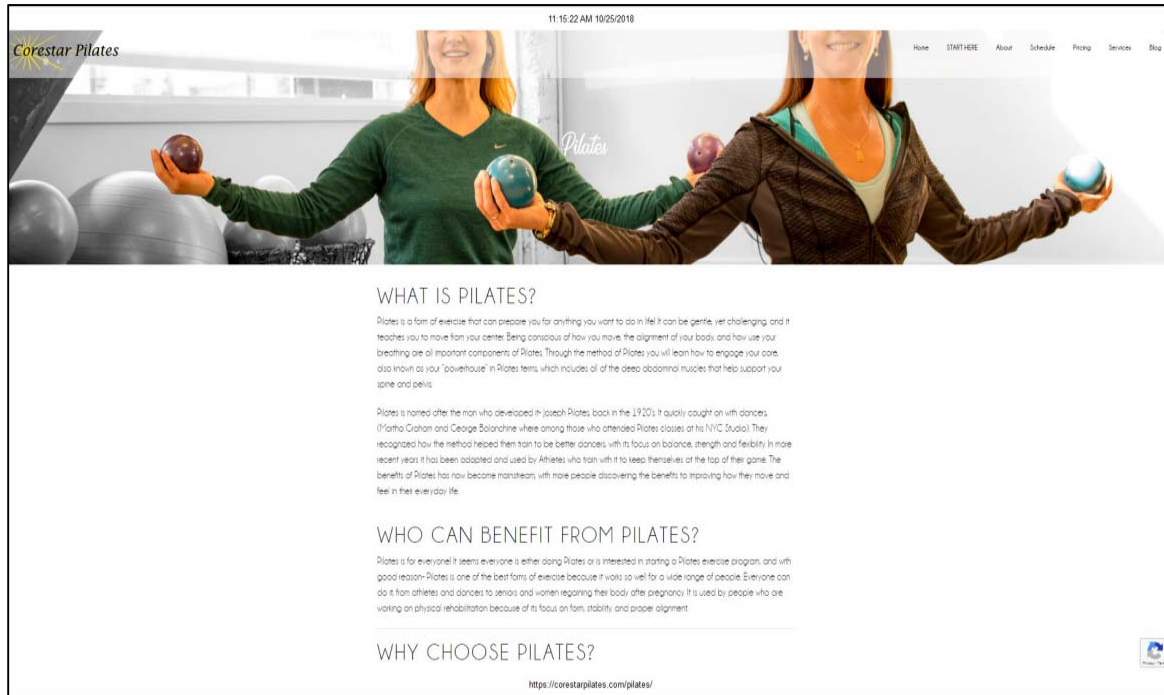
³⁸ February 19, 2019 Request for Reconsideration at TSDR 74 (MERRIAM-WEBSTER DICTIONARY).

Registration is for generic Pilates.” 7 TTABVUE 6. According to Applicant, “Amplified Yoga is distinct from Pilates as being about mental, spiritual and emotional fitness using a mat and movement/stretching exercises set to music, as opposed to only generic physical fitness using a complex machine or ‘Reformer’” and under “no circumstances would Amplified Yoga incorporate a machine into the practice.” *Id.*

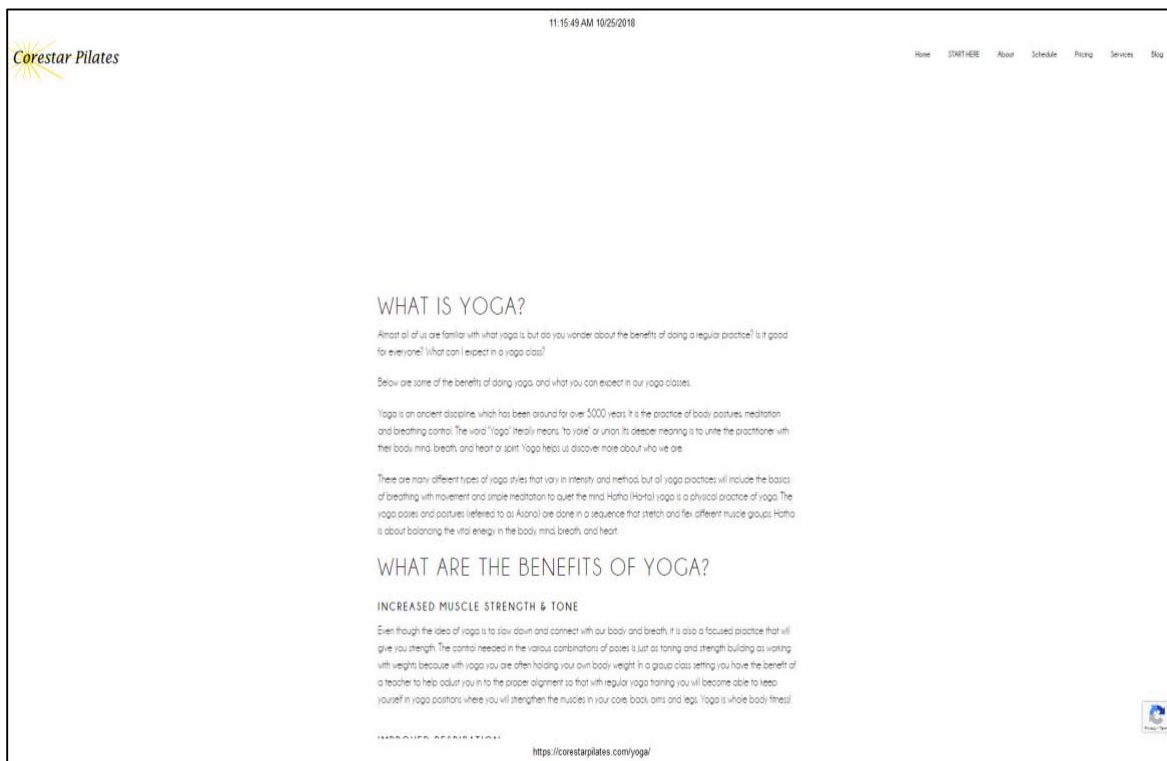
The Examining Attorney responds that the “services at issue are highly related because these services commonly emanate from the same commercial entity under the same mark.” 10 TTABVUE 11. She cites “Internet evidence consisting of screenshots from websites showing providers of both yoga and Pilates instruction under the same mark,” *id.*, which she argues shows that “entities commonly offer yoga and Pilates instruction under the same mark and market the services through the same trade channels.” *Id.* at 12. She concludes that “the specialized tailoring of applicant’s yoga services pointed out by applicant in [his] brief fails to traverse the strong evidence showing that the *identified* yoga services are highly related to the *identified* Pilates instruction.” *Id.* at 13.

We agree with the Examining Attorney that the identified services in the application and cited registration are closely related. The record contains multiple webpages on which fitness studios offer both yoga instruction and pilates instruction under the same mark. We reproduce several below:³⁹

³⁹ In addition to these pages, a page from the website of Balance Studio displays photographs of the same customer participating in both a group pilates class and a group yoga class, November 29, 2018 Final Office Action at TSDR 2, and a page from the PiYoBa Studio lists an instructor who teaches both pilates and yoga classes. *Id.* at TSDR 12.



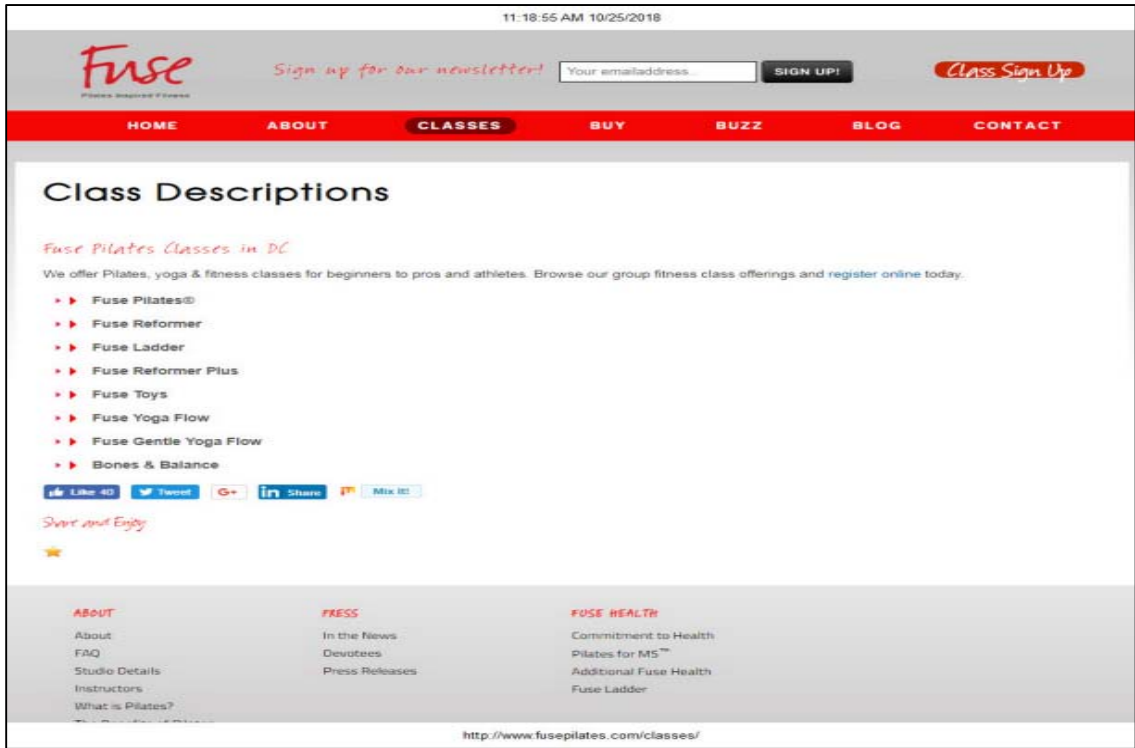
40



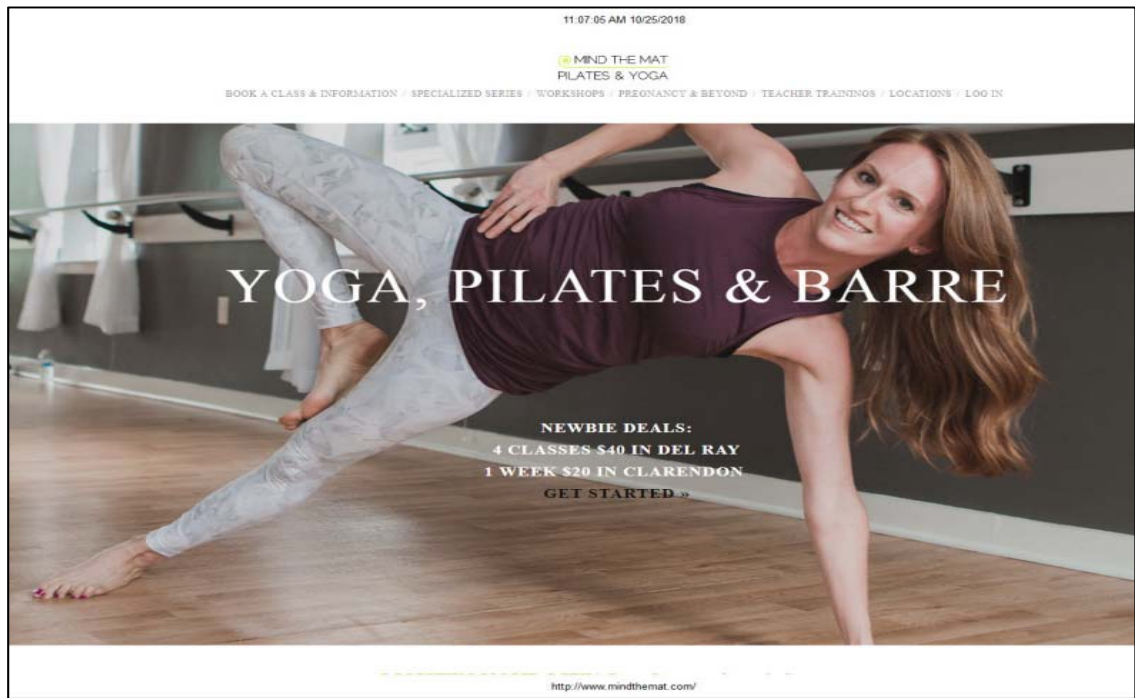
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⁴⁰ October 25, 2018 Office Action at TSDR 4 (corestarpilates.com/pilates).

⁴¹ *Id.* at TSDR 5 (corestarpilates.com/yoga).



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⁴² *Id.* at TSDR 7 (fusepilates.com/classes).

⁴³ *Id.* at TSDR 9 (mindthemat.com).

2:12:19 PM 11/29/2018




9124 CENTER STREET MANASSAS, VA, 20110 571-428-2880

WELCOME SCHEDULE CLASSES STUDIO GIFTS EVENTS

Thanksgiving Week Schedule
 Monday: As scheduled
 Tuesday: As scheduled
 Wednesday **Morning**: As scheduled // **Wednesday Night**: CLOSED
 Thursday: 8am Thanksgiving Day Yoga w/ Candi
 Friday: 10am Mat Pilates Turkey Burn w/ Lesley & 11am Vinyasa Flow Yoga w/ Leslie
 Saturday: 8am Mat Pilates & Yoga, all later classes canceled
 Sunday: As scheduled

Announcements:
 11/30: The Christmas tree lighting and Santa visit takes place this night in Old Town, therefore:
 6:30pm: Yoga CANCELED
 12/1: Old Town Manassas Christmas Day Parade—**ALL classes will be canceled this day**, including:
 8am: Pilates mat & Yoga
 9am: Pilates circuit
 9:30am: Yoga
 10am: Group reformer



<http://www.centerstreetpilates.com/>

44

2:04:44 PM 11/29/2018

HOME CLASSES SCHEDULE PRICING PERSONAL TRAINING PERSONALIZED LIFESTYLE MEDICINE: EPIGENETIC ENDEAVORS GIFT CARDS

<p style="text-align: center;">IT'S ALL ABOUT CROSS-TRAINING</p> <p>PILATES MAT It's different at Energy. We educate, instruct and teach where the core really is. This is the encyclopedic class based on Joseph Pilates teachings. <i>All classes at Energy are Pilates-based.</i> ALL LEVELS</p> <p>POWER PILATES "Next-level" Pilates. Strength, endurance and flexibility; suitable for all students who have experience with Pilates Mat. Intermediate/Advanced</p> <p>PILATES CARDIO Fat-burning barefoot cardio with lower & upper body concentrations involving core and balance. Topped off with Pilates. ALL LEVELS</p> <p>SCULPT-H.I.I.T Our infamous weight-training group fitness class with fat burning cardio drills thrown in. (H: high I: Intensity I: interval T: training). ALL LEVELS</p> <p>CARDIO H.I.I.T Think Tabata with a twist. High intensity interval training using a mix of body weight and free weights. Interval type and duration varies by class, designed to keep you engaged and energized. ALL LEVELS</p> <p style="text-align: center;">WORK IT CIRCUIT</p> <p>This class will challenge you in all of the required ACSM guidelines of fitness: cardio, resistance, flexibility and function and Energy's guidelines: fun, fast moving, full body and making time fly.</p>	<p style="text-align: center;">THE MOST VARIETY OF ANY FITNESS STUDIO</p> <p>CANDLELIGHT YOGA The perfect balance of gentle yoga and stretching. A variety of props will be used to help achieve relaxation for body, mind, and spirit.</p> <p>VINYASA YOGA Flow in and out of sun salutations linking breath with movement, to work out every part of your body. This class will build strength, tone and detoxify the body. <i>WINNER Best Yoga Class Woodbury Magazine.</i></p> <p>VINYASA YOGA II A class for our intermediate and advanced yogis. Vinyasa II is a faster flow that incorporates arm balance, inversion, and intense core work.</p> <p>YOGA SCULPT Boost your yoga practice by adding weights to build muscular endurance and strength.</p> <p>YOGA BARRE Opposites attract. Warm up with a stress relieving yoga flow, then tuck, tighten, and tone your body at the barre. Class wraps up with a few minutes of soul-soothing savasana.</p> <p>RhythOM A blend of Yoga, Pilates, and Modern Dance; RhythOM uses simple patterns and flowing movements to strengthen the body, increase flexibility, and free the mind. No judgement allowed! <i>YOGA - All levels welcome unless noted</i></p> <p>ENERGY SCULPT Efficient weight training at its best. A fun, full-body workout using a proven formula: light weights & high reps. You'll work multiple muscle groups at once. ALL LEVELS</p> <p style="text-align: center;">SPECIAL MONTHLY CLASSES:</p> <p style="text-align: center;">http://www.energypilatesfitness.com/class-descriptions.html</p>	<p style="text-align: center;">THINK "PERSONAL TRAINING MEETS GROUP FITNESS"</p> <p>PUSH CARDIO The ultimate power-packed cardio training class - performed barefoot on matted floors for plyo and balance work. You'll perform a variety of full range-of-motion exercises infused with athletic drills & an ever-changing mix of cardio & strength exercises. <i>WINNER Best Group Fitness Class Woodbury Magazine.</i> INTERMEDIATE/ADVANCED</p> <p>TABATA Cardio & strength training as developed by Dr. Tabata. This class is exciting & dynamic with high metabolic drills which equals massive calorie expenditure. Intermediate Advanced</p> <p>BARRE BODY "Booty" workouts work! With a special emphasis on the lower body, this low impact class shapes, lifts, tucks, and tones. Demonstrated by Energy on <i>Twin Cities Live</i> ALL LEVELS</p> <p>BADASS BARRE Dig deep to tap into mental and physical strength for this total body workout, with a special emphasis on the legs, glutes, and core.</p> <p>CARDIO KICKBOXING This is a class designed using cardio, boxing, and martial arts to improve your strength, flexibility, speed and overall aerobic fitness. We'll kick, punch, and hook our way to health. INTERMEDIATE/ADVANCED</p> <p>ELEVATION This is not your traditional chair workout. Elevate your weight training routine with large range of motion exercises using the full height of a chair. A full body exercise with a special emphasis on legs & glutes.</p>
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44 November 29, 2018 Final Office Action at TSDR 4 (centerstreetpilates.com).

45 *Id.* at TSDR 8 (energypilatesfitness.com).

These webpages show that the identified services are commonly offered by fitness instructors under the same mark or business name, and are strong evidence of the relatedness of the services. *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1051; *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davia*, 110 USPQ2d 1810, 1815-17 (TTAB 2014); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). Applicant is correct that yoga and pilates are different disciplines, 7 TTABVUE 6, but “the issue is not whether consumers would confuse the services themselves, but rather whether they would be confused as to the source of the services.” *Bond v. Taylor*, 119 USPQ2d 1049, 1053 (TTAB 2016) (quoting *Miss Universe LP v. Community Mktg. Inc.*, 82 USPQ 1562, 1568 (TTAB 2007)). The record shows that the circumstances surrounding the marketing of the respective services “are such that they could give rise to the mistaken belief that they emanate from the same source” when offered under similar marks. *Coach Servs.*, 101 USPQ2d 1722 (internal quotation omitted). We find that the second *DuPont* factor supports a finding of a likelihood of confusion.

There are no limitations as to trade channels in the identifications of services in the application and cited registration, so “we presume that the . . . services move in all channels of trade that are normal for such . . . services.” *In re FCA US LLC*, 126 USPQ2d 1214, 12211 (TTAB 2018). The record shows that the trade channels for yoga instruction and pilates instruction include fitness studios. We find that the third *DuPont* factor also supports a finding of a likelihood of confusion.

D. Purchase Conditions and Purchaser Sophistication

“The fourth *DuPont* factor considers ‘[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.’” *Stone Lion*, 110 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567). Applicant argues that his “classes are tailored to individuals that are specifically interested in integrating music beats, energy center work and yoga,” while the pilates instruction in the cited registration “is a mass produced method and system of stretching and strengthening using a specialize machine.” 7 TTABVUE 8. Applicant claims that “[e]ach of these are targeted toward a specific customer with distinct needs and objectives who would exercise a high degree of care due to the distinct nature of the classes and outcome desired.” *Id.* He concludes that “Pilates students would be looking for Pilates classes, just as, yoga students would be looking for yoga classes” and “[s]omeone looking for a Pilates class would not be confused by a yoga class and vice versa, because it is simply not what they are specifically looking for.” *Id.*

Applicant’s argument essentially reprises his mistaken argument under the second *DuPont* factor that the services are not related because consumers would not confuse one for the other. His argument is equally unavailing under the fourth *DuPont* factor, which focuses on the identity of the consumers of the subject goods or services, and the degree of care that they bring to the purchase decision under the relevant conditions of purchase. The record shows that both yoga instruction and pilates instruction are offered and rendered to the general public, which includes

persons of all levels of fitness, experience, and sophistication.⁴⁶ Even if some purchasers of yoga instruction and pilates instruction services are experienced and knowledgeable practitioners of the disciplines, Board precedent “requires the decision to be based ‘on the least sophisticated potential purchasers.’” *Stone Lion*, 110 USPQ2d at 1163 (quoting *Gen. Mills, Inc. v. Fage Dairy Proc. Indus. S.A.*, 100 USPQ2d 1584, 1600 (TTAB 2011), *judgment set aside on other grounds*, 2014 WL 343267 (TTAB Jan. 22, 2014)). The “least sophisticated potential purchasers” of both yoga instruction and pilates instruction include beginners and ordinary consumers who may engage casually in fitness instruction. There is nothing in the record to show that such purchasers would exercise anything more than ordinary care in purchasing the services, and the fourth *DuPont* factor is neutral in our analysis of the likelihood of confusion. *Id.* at 1162-63 (finding that Board properly considered the least sophisticated purchaser of investment services even though the record showed that both parties “require[d] large minimum investments and target[ed] sophisticated investors” where the identifications of services were not limited to that class of investors).

⁴⁶ Fuse Pilates studio “offer[s] Pilates, yoga & fitness classes for beginners to pros and athletes.” October 25, 2018 Office Action at TSDR 7. Mind The Mat Pilates & Yoga studio offers beginner level yoga fundamental series for persons who “always wanted to practice yoga but didn’t know where to start.” *Id.* at TSDR 10. Center Street Studios offers a yoga class “appropriate for students of all levels,” November 29, 2018 Final Office Action at TSDR 6, and Energy Pilates Fitness & Yoga studio similarly offers pilates and yoga classes for all levels of students. *Id.* at TSDR 8. The Corestar Pilates website states that pilates “is one of the best forms of exercise because it works so well for a wide range of people. Everyone can do it from athletes to dancers to seniors to women regaining their body after pregnancy.” October 25, 2018 Office Action at TSDR 4.

E. The Absence of Actual Confusion

The eighth *DuPont* factor “examines ‘the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’” *Guild Mortg.*, 129 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ 567). Applicant argues in his appeal brief that “[t]here is no evidence of actual confusion.” 7 TTABVUE 9. He does not provide a declaration regarding the circumstances of any co-existence of his mark and the mark in the cited registration, *see id.* at 1162-63 (discussing declaration of the applicant’s President and CEO setting forth circumstances of coexistence of the involved marks), but even if we accept Applicant’s one-sentence argument as evidence, the eighth *DuPont* factor is not probative of no likelihood of confusion.

The “absence of any reported instances of actual confusion would be meaningful only if the record indicated appreciable and continuous use by [Applicant] of [his] mark for a significant period of time in the same markets as those served by [the registrant] under its mark[].” *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Applicant argues that the “Owners of the Cited Registration operate out of Illinois, while the Applicant operates out of California.” 7 TTABVUE 7.⁴⁷ Applicant does not establish the geographic scope of his or the registrant’s business, or show that his or the registrant’s mark has been exposed through advertising or otherwise in the other’s area of operation. On this record, we cannot

⁴⁷ The registrant’s address of record is in Chicago, September 28, 2017 Office Action at TSDR 5, while Applicant’s address of record is in West Hollywood. June 28, 2017 Application at TSDR 1.

find that Applicant and the registrant have ever operated in the same geographic area, which limits, if not eliminates entirely, the opportunity for confusion to occur. *See, e.g., Nina Ricci, S.A.R.L. v. E.T.F. Enters., Inc.*, 889 F.2d 1070, 12 USPQ2d 1901, 1903 (Fed. Cir. 1989) (finding that the absence of evidence of actual confusion was of very little, if any, probative value because, among other reasons, “no evidence was presented as to the extent of [the applicant’s] use of [its] mark on the merchandise in question during prior years”); *Gillette Can.*, 23 USPQ2d at 1774 (finding that there was “simply no evidence that the parties’ goods have been sold together in the same locality for a significant period of time so that, if confusion were likely to occur, circumstances have been such that it could be expected to have happened.”); *cf. Guild Mortg.*, 129 USPQ2d at 1164 (noting that the applicant and registrant “operated in the same geographic market—southern California—without any evidence of actual confusion.”).

Moreover, as noted above, the involved application was filed in June 2017 on the basis of Applicant’s intention to use his mark, and it has not been amended to allege use of the mark. Applicant does not state how long he has used his mark, so the duration of the period of coexistence is unknown. Even assuming, however, that such use began in June 2017 when Applicant filed his intent-to-use application,⁴⁸ the period of coexistence with the cited mark is less than three years, which is not probative of no likelihood of confusion. *See In re Azteca Rest. Enters. Inc.*, 50 USPQ2d

⁴⁸ Applicant claimed September 1, 2017 as the date of first use in the oldest of his eight registrations of the AMPLIFIED YOGA mark for various goods and services. He claimed first use on December 20, 2018 in the other seven registrations.

1209, 1212 (TTAB 1999) (20 years of simultaneous use of the marks not probative of no likelihood of confusion where parties' respective restaurants were located in the Pacific Northwest and Chicago); *cf. In re Gen. Motors Corp.*, 23 USPQ2d 1465, 1470-71 (TTAB 1992) (holding that evidence of the absence of actual confusion for nearly 30 years was probative of no likelihood of confusion in view of a "confluence of facts," including large sales of both sets of goods and expansion of the applicant's use of its mark into the goods identified in the cited registration, which "persuasively point[ed] to confusion as being unlikely.") On this record, we find that the eighth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

F. Eleventh and Twelfth *DuPont* Factors

Applicant alludes to the eleventh *DuPont* factor, 7 TTABVUE 9, the "extent to which applicant has a right to exclude others from use of its mark on its goods," *DuPont*, 177 USPQ at 567, and the twelfth *DuPont* factor, the "extent of potential confusion, i.e., whether de minimis or substantial." *Id.* Applicant's argument under the eleventh factor is that "[d]ue to the diluted field and weakness of Marks by third party uses and registrations previously discussed, the Cited Registration would have no blanket right to exclude others from using the Marks, except within a narrow ambit of protection," 7 TTABVUE 9, and that the cited registrant did not oppose "any of the Applicant's trademark applications for AMPLIFIED YOGA that have since registered" *Id.* Applicant's argument under the twelfth factor is that "[i]n view of third party uses, registrations and the failure to exclude or 'Oppose' any of

Applicant's applications, the extent of potential confusion is de-minimis and assertion of third party rights to date is entirely absent." *Id.* Neither argument is persuasive.⁴⁹

As discussed above under the sixth *DuPont* factor, no third-party uses of AMPLIFIED marks have been made of record, and only one of the third-party registrations in the record is relevant and it is insufficient to show that the mark in the cited registration is diluted or weak, or that consumers can distinguish between marks that we have found to be similar when they are used in connection with services that we have found to be related. As discussed below in connection with the thirteenth *DuPont* factor, the fact that Applicant's applications to register AMPLIFIED YOGA for other goods and services have not been opposed by the registrant and have matured into registrations does not ipso facto entitle Applicant to register the mark in this application as well. On this record, we find that the

⁴⁹ In a section of Applicant's appeal brief entitled "Area and Manner of Concurrent Use," 7 TTABVUE 6-7, which could be construed as directed to the twelfth *DuPont* factor, Applicant argues that confusion is unlikely because the "Owners of the Cited Registration operate out of Illinois, while the Applicant operates out of California." *Id.* at 7. This argument is unavailing because Applicant "seeks a geographically unrestricted registration under which it might expand throughout the United States," *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983), and the cited registration is also geographically unrestricted, which presumptively gives the registrant "the exclusive right to use its mark throughout the United States." *Id.* See also *In re Appetito Provisions, Inc.*, 3 USPQ2d 1553, 1554 n.4 (TTAB 1987). Thus, we cannot consider the possible geographically separate uses of the subject marks by Applicant and the registrant under this factor. *Id.* Applicant also claims that his "classes are tailored to individuals that are specifically interested in integrating music beats, energy center work and yoga," while "Pilates is a mass produced method and system of stretching and strengthening using a machine," such that "there would be no confusion between Pilates and yoga classes." 7 TTABVUE 7. This is merely another iteration of Applicant's argument under the second and fourth *DuPont* factors that confusion is not likely between the services. We reject the argument here for the reasons previously discussed under those factors.

eleventh and twelfth *DuPont* factors are neutral in our analysis of the likelihood of confusion.

G. The Thirteenth *DuPont* Factor

“The thirteenth and final *du Pont* factor pertains to ‘any other established fact probative of the effect of use.’” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *15 (TTAB 2019) (quoting *DuPont*, 177 USPQ at 567). “Rarely invoked, this factor ‘accommodates the need for flexibility in assessing each unique set of facts’” *Id.* (quoting *Strategic Partners*, 102 USPQ2d at 1399). The factor may be implicated in a variety of circumstances “such as the coexistence of an applicant’s prior registered mark with the cited registration. Where an applicant owns a prior registration and the mark is ‘substantially the same’ as in the applied-for application, this can weigh against finding that there is a likelihood of confusion.” *Id.* (citing *Inn at St. John’s*, 126 USPQ2d at 1748).

Applicant does not expressly invoke this factor, but he argues that “the Office has allowed the Cited Registration to coexist with AMPLIFIED YOGA with respect to related goods for yoga under 8 distinct G & S Classes referenced below and owned by the Applicant.” 7 TTABVUE 7. Applicant owns the following registrations of the standard character mark AMPLIFIED YOGA:⁵⁰

⁵⁰ As noted above, Applicant made of record TSDR records for one of these registrations and for seven published applications to register AMPLIFIED YOGA. February 19, 2019 Request for Reconsideration at TSDR 57-72. For the reasons discussed above, we deem the current TSDR records for the seven subsequently issued registrations to be of record.

- Registration No. 5479197, issued on May 29, 2018, for “manually-operated exercise equipment for physical fitness programs, yoga blankets, yoga blocks, yoga boards, yoga bolsters, yoga cushions, yoga gloves, yoga straps, and stretch bands for yoga and physical fitness purposes;”
- Registration No. 5693038, issued on March 5, 2019, for “athletic tops and bottoms for yoga instruction and related services, namely, for use during yoga classes, workshops, retreats, and teacher training classes;”
- Registration No. 5693039, issued on March 5, 2019, for “bags specially adapted for yoga mats;”
- Registration No. 5693049, issued on March 5, 2019, for “digital media, namely, pre-recorded video cassettes, digital video discs, digital versatile discs, downloadable audio and video recordings, DVDs, and high definition digital discs featuring yoga instruction, motivational speaking and self improvement; Visual and audio recordings featuring yoga instruction, motivational speaking and self improvement;”
- Registration No. 5693050, issued on March 5, 2019, for “educational books featuring yoga instruction, motivational speaking and self improvement; printed matter, namely, paper signs, books, manuals, curricula, newsletters, informational cards and brochures in the field of yoga instruction, motivational speaking and self improvement;”
- Registration No. 5693076, issued on March 5, 2019, for “retail store services featuring green and eco-friendly products in the nature of yoga, namely,

yoga accessories and equipment, yoga clothing, yoga bags and water bottles, yoga related A/V recordings, and yoga related books and manuals;”

- Registration No. 5693077, issued on March 5, 2019, for “reusable glass and plastic water bottles sold empty; sports bottle belts for yoga also featuring storage for other items; vacuum bottles; water bottle belts for yoga; water bottles sold empty;” and
- Registration No. 5698744, issued on March 12, 2019, for “streaming of audio and video tethered downloads; streaming of audio, visual and audiovisual material via a global computer network.”

In *Strategic Partners*, 102 USPQ2d at 1397, the Board reversed a refusal under Section 2(d) to register the stylized mark shown below

ANYWEAR

for footwear on the basis of confusing similarity to the mark shown below



for various items of clothing. The applicant owned a registration of ANYWEARS in standard characters for footwear that had coexisted with the cited mark for more than five years. *Id.* at 1398. In its *DuPont* likelihood of confusion analysis, the Board found that the marks, goods, channels of trade, and classes of purchasers were similar, but that the thirteenth *DuPont* factor outweighed all the others in the

“unique situation presented by the coexistence of applicant’s existing registration with the cited registration for over five years, when applicant’s applied-for mark is substantially similar to its existing registered mark, both for identical goods.” *Id.* at 1400.

In *Country Oven*, the Board discussed the proper application of *Strategic Partners* in cases involving an applicant’s claim of ownership of one or more prior registrations that have coexisted with the cited mark. The Board quoted Section 1207.01 of the TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) as follows:

In view of *Strategic Partners*, when determining whether the coexistence of the applicant’s prior registration with another party’s registration weighs against citing the latter registration in a §2(d) refusal of the applicant’s applied-for mark, the examining attorney should consider: (1) whether the applicant’s prior registered mark is the same as the applied-for mark or is otherwise not meaningfully different; (2) whether the identifications of goods/services in the application and the applicant’s prior registration are identical or identical in relevant part; and (3) the length of time the applicant’s prior registration has co-existed with the registration being considered as the basis for the §2(d) refusal. . . . The duration of coexistence is not dispositive as to whether a §2(d) refusal should issue; instead, this factor should be considered together with all the other relevant du Pont factors. . . .

Country Oven, 2019 USPQ2d 443903 at *16 (internal citations omitted).

The Board found in *Country Oven* that the applicant’s three prior registrations of COUNTRY OVEN marks for various goods and services did not cause the thirteenth *DuPont* factor to outweigh the similarity of the applicant’s standard character COUNTRY OVEN mark for bakery shop services to the standard character COUNTRY OVEN mark for bread buns. *Id.* at *17-18. The Board held that “there is

no rule that a prior registration entitles a party to another registration,” and that the thirteenth *DuPont* factor “is highly fact specific and it is under very specific circumstances that this factor may matter.” *Id.* at *18. The Board found that “those circumstances do not exist here,” *id.*, because two of the prior registrations were for the same mark as the applied-for mark, but covered different services, one of the registrations was for a composite mark and also covered different services, and two of the registrations were less than five years old and could be challenged in a cancellation proceeding under Section 2(d). *Id.* at *17-18.

Here, as in *Country Oven*, the “very specific circumstances” under which the thirteenth *DuPont* factor may matter do not exist. All eight of Applicant’s registrations are for the same AMPLIFIED YOGA mark shown in this application, but all of them are for different goods or services and all of them are vulnerable to a cancellation proceeding by the owner of the cited registration. The thirteenth *DuPont* factor does not apply.

Finally, we address Applicant’s argument that “there are multiple instances where Pilates and yoga have been allowed to co-exist by the USPTO for similarly related goods and services,” such that “it would be inconsistent to refuse to allow the Present Application to co-exist with the Cited Registration.” 7 TTABVUE 7. In his reply brief, Applicant argues that the USPTO has registered marks containing common elements, but owned by different entities, for yoga-related goods and services and pilates-related goods and services. 11 TTABVUE 3-4. He “requests acknowledgment and explanation of why the Office has allowed similarly situated

marks to co-exist but continues to reject the present Application,” *id.* at 3, and states that he “merely wishes to be treated the same as applicants that came before the present case.” *Id.* at 4. He reiterated these requests at the oral hearing.

The registration of different (even if “similarly situated”) marks for yoga instruction and pilates instruction does not justify reversing the refusal to register AMPLIFIED YOGA for the services in this application. It is axiomatic that each application for registration must be considered on its own merits, and neither the Examining Attorney nor the Board is bound by the actions of other examining attorneys who have issued registrations of other marks based on other records. *See, e.g., In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (TTAB 2001). “While we recognize that ‘consistency is highly desirable,’ . . . consistency in examination is not itself a substantive rule of trademark law, and a desire for consistency with decisions of prior examining attorneys must yield to proper determinations under the Trademark Act and rules.” *In re Am. Furniture Warehouse CO*, 126 USPQ2d 1400, 1407 (TTAB 2018) (quoting *In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007)). The record here amply supports the refusal to register.

H. Conclusion

The first, second, and third *DuPont* factors support a finding of a likelihood of confusion, as Applicant’s mark and the mark in the cited registration are quite similar and the identified services are commonly offered by the same entity under the same mark to overlapping consumers. The fourth, sixth, eighth, eleventh, and twelfth

DuPont factors are neutral and the thirteenth *DuPont* factor is inapplicable. We therefore find, on the basis of the record a whole, that consumers would readily conclude that the “yoga instruction” services sold under the AMPLIFIED YOGA mark and the “pilates instruction” services sold under the AMPLIFIED PILATES CENTER mark are provided by one and the same entity.

Decision: The refusal to register is affirmed.