

This Opinion Is Not a  
Precedent of the TTAB

Mailed: April 21, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Spiritual Warrior Inc.*

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Application Serial No. 88459695

Francis John Ciaramella of Francis John Ciaramella, PLLC for Spiritual Warrior Inc.

James McNamara, Trademark Examining Attorney, Law Office 127,  
Mark Pilaro, Managing Attorney.

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Before Bergsman, Greenbaum and Johnson, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Spiritual Warrior Inc. (Applicant) seeks to register the mark SHAKTI WARRIOR,  
in standard character format, for the goods listed below:

Athletic pants; Athletic tights; Athletic tops and bottoms  
for yoga; Hats; Jogging pants; Leggings; T-shirts; Tank  
tops; Yoga pants; Graphic T-shirts, in International Class  
25; and

Meditation mats; Personal exercise mats; Yoga mats; Yoga  
towels specially adapted for yoga mats; Bags specially  
adapted for yoga mats, in International Class 27.<sup>1</sup>

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<sup>1</sup> Serial No. 88459659 filed June 5, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use of its mark anywhere as of May 25, 2019, and first use of its mark in commerce as of June 1, 2019, for the goods in both classes.

The Examining Attorney refused to register Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark SHAKTI WARRIORS, in standard character form, for, inter alia, the services listed below as to be likely to cause confusion:

Entertainment services, namely, providing temporary use of online nondownloadable multimedia entertainment software for use in promotion of positive self-esteem and health; providing online animated computer games; educational services, namely, providing public appearances, classes, seminars, and workshops designed to educate the general public, patients and health care professionals on the importance of exercise and proper nutrition and emotional well-being and distributing corresponding educational materials, in International Class 41.<sup>2</sup>

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight

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<sup>2</sup> Registration No. 3365711 registered January 8, 2008; renewed. The registration includes goods in International Classes 16 and 28 that the Examining Attorney did not cite as a bar to registration.

afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, \*3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“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.”). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

**I. The number and nature of similar marks in use on similar goods and services.**

Even though third-party registrations are not evidence of use, Applicant submitted copies of nine third-party registrations purportedly registered for yoga-related goods and services as evidence of the number and nature of similar marks in use for similar goods contending that because of the coexistence of these registrations

“it cannot be said that Applicant’s mark will create a likelihood of confusion [with the mark in the cited registration].”<sup>3</sup>

The descriptions of goods and services in the three registrations listed below do not include yoga-related goods or services and, therefore, they are not relevant and we give them no consideration:

- Registration No. 4311545 for the mark SHAKTI LIFE KITCHEN and design for adult cooking classes;<sup>4</sup>

- Registration No. 4483688 for the mark SHAKTI PUMPING LIFE for pumps and motors;<sup>5</sup> and

- Registration No. 4132391 for the mark SHAKTI, in standard character form, for, inter alia, “seminars, workshops and classes, **excluding yoga, dance and yoga and dance instruction**, designed to promote awareness and educate the general public on the importance of exercise and proper nutrition and emotional well-being and distribution corresponding educational materials” (emphasis added).<sup>6</sup>

*See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1694 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *i.am.symbolic*,

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<sup>3</sup> September 11, 2020 Request for Reconsideration (TSDR 10 and 13-30); Applicant’s Brief, p. 8 (6 TTABVUE 9).

Citations to the record are to the USPTO Trademark Status and Document Retrieval System (TSDR) by page number in the downloadable .pdf format.

<sup>4</sup> *Id.* at TSDR 13.

<sup>5</sup> *Id.* at TSDR 24.

<sup>6</sup> *Id.* at TSDR 26.

*llc*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *TAO Licensing, LLC v. Bender Consulting Ltd.*, 125 U.S.P.Q.2d 1043, 1058 (TTAB 2017) (third party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case.”).

While the remaining six registrations include “Shakti,” they do not include the words “Warrior” or “Warriors” and, therefore, none of these registrations is as close to the mark in the cited registration SHAKTI WARRIORS as Applicant’s mark SHAKTI WARRIOR. As discussed more fully in the next section, we analyze the similarity or dissimilarity of the marks in their entireties. *DuPont*, 177 USPQ at 567

Finally, we note that the “existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them.” *AMF Inc. v. American 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 terms, we must “adequately account for the apparent force of [third-party use] evidence,” regardless of whether Applicant has proven the “specifics” pertaining to the extent and impact of such use. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-5 (Fed. Cir. 2015). “[E]xtensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin Ausrüstung Fur*

*Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (citing *Juice Generation*, 115 USPQ2d at 1674).

Unlike cases in which extensive evidence of third-party use and other evidence in the record was found to be “powerful on its face” inasmuch as “a considerable number of third parties use [of] similar marks was shown,” *Juice Generation*, 115 USPQ2d at 1674, Applicant has presented, at most, six third-party registrations, well short of the volume of evidence found convincing in *Jack Wolfskin* and *Juice Generation*.

The number and nature of similar marks in use in connection with similar goods is a neutral factor.

## **II. The similarity or dissimilarity of the marks.**

We now turn to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong*,

*Inc.*, 901 F.3d 1367, 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)).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this appeal, because Applicant is seeking to register its mark for athletic and yoga clothing and gear, the average customers are ordinary consumers who exercise or practice yoga.

Applicant's mark SHAKTI WARRIOR is essentially identical to the registered mark SHAKTI WARRIORS. The difference between the two marks, if a customer even notices, is that Applicant's mark is singular whereas the registered mark is plural. Thus, there is no material difference between the marks. *See Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (finding no material difference between the singular and plural forms of ZOMBIE such that the marks were considered the same mark); *Weidner Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (Applicant's mark SHAPES is "essentially the same mark" as SHAPE); *In re Strategic Partners, Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012) ("the difference between the singular form ANYWEAR depicted in the

applied-for mark and the plural form ANYWEARS in applicant's existing registration is not meaningful.”).

We find that Applicant's mark SHAKTI WARRIOR is legally identical to the registered mark SHAKTI WARRIORS.

**III. The similarity or dissimilarity and nature of the goods and services.**

Applicant is seeking to register SHAKTI WARRIOR for athletic and yoga clothing and gear, including mats, and the mark in the cited registration is registered for, inter alia, “educational services, namely, providing public appearances, classes, seminars, and workshops designed to educate the general public, patients and health care professionals on the importance of exercise and proper nutrition and emotional well-being and distributing corresponding educational materials”.<sup>7</sup>

The Examining Attorney submitted the evidence summarized below.<sup>8</sup> However, with the exception of the evidence related to Under Armour, the evidence does not

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<sup>7</sup> Examining Attorney's Brief (8 TTABVue 10). The Examining Attorney focuses his analysis on these services stating “[t]he record contains third-party website evidence demonstrating that the same entities frequently provide Applicant's [goods] with Registrant's ‘educational services, namely, providing public appearances, classes, seminars, and workshops designed to educate the general public, patients and health care professionals on the importance of exercise and proper nutrition and emotional well-being and distributing corresponding educational materials.’” We too will focus our analysis on those activities.

<sup>8</sup> The Examining Attorney did not submit any third-party registrations for goods and services listed in the both the application and registration at issue to prove that the goods and services are related. Third-party registrations based on use in commerce that individually cover a number of different goods or services may have probative value to the extent that they serve to suggest that the listed goods or services are of a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, \*8 (TTAB 2019); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993). Presumably, there were no relevant third-party registrations for the goods and services in both the application and the registration at issue.



persuade us that “it is common for entities to offer both Applicant and Registrant’s goods and services.”<sup>9</sup>

- Excerpt from the **lululemon** website (lululemon.com) advertising the sale of women’s coats and jackets (not the clothing in Applicant’s application) and a YouTube video “lululemon | Yoga for Beginners | 45 minute class with Annie Clark.”<sup>10</sup> This is a beginners’ yoga video, not an activity designed to educate the general public, patients and health care professionals on the importance of exercise and proper nutrition and emotional well-being;

- Excerpts from the UNDER ARMOUR website (underarmour.com) advertising the sale of yoga and studio tops and yoga mats displaying the UA logo  as well as advertising the sale of a “MapMyFitness” app for tracking runs, rides, walks, hikes, and nutrition.<sup>11</sup> UNDER ARMOUR produced a nutrition video posted on YouTube supporting fitness training through nutrition;<sup>12</sup>

- NIKE posted a workout video on YouTube<sup>13</sup> and excerpts from the NIKE website (nike.com) advertising the sale of athletic and yoga wear.<sup>14</sup> The workout video is not

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<sup>9</sup> Examining Attorney’s Brief (8 TTABVUE 9).

<sup>10</sup> September 14, 2019 Office Action (TSDR 10 and 21). The Examining Attorney also submitted excerpts from the **lululemon** website advertising the sale of yoga mats but the excerpts did not display the **lululemon** word mark on the yoga mats. *Id.* at TSDR 24-30. In addition, the Examining Attorney submitted excerpts from the lululemon website advertising “Festivals + Retreats” but the excerpts did not indicate the subject matter with the exception of the August 12, 2017 SeaWheeze “Yoga.Run.Party.” *Id.* at TSDR 31-33.

<sup>11</sup> *Id.* at TSDR 34-46.

<sup>12</sup> *Id.* at TSDR 47-49.

<sup>13</sup> *Id.* at TSDR 50-51.

<sup>14</sup> *Id.* at TSDR 52-62.

an activity designed to educate the general public, patients and health care professionals on the importance of exercise and proper nutrition and emotional well-being;

- ADIDAS posted a workout video on YouTube<sup>15</sup> and excerpts from the ADIDAS website (adidas.com) advertising the sale of athletic wear<sup>16</sup> and yoga mats.<sup>17</sup> The workout video is not an activity designed to educate the general public, patients and health care professionals on the importance of exercise and proper nutrition and emotional well-being;

- The ATHLETA website (athlete.gap.com) posted a feature regarding an Alli Simon a meditation facilitator and yoga teacher.<sup>18</sup> The ATHLETA website also advertises the sales of clothing<sup>19</sup> and yoga gear, including mats.<sup>20</sup> The profile on Alli Simon is a human interest story, not an activity designed to educate the general public, patients and health care professionals on the importance of exercise and proper nutrition and emotional well-being; and

- REEBOK has posted numerous workout videos on YouTube<sup>21</sup> and the REEBOK

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<sup>15</sup> March 12, 2020 Office Action (TSDR 7-9).

<sup>16</sup> *Id.* at TSDR 10-18.

<sup>17</sup> *Id.* at TSDR 19-23.

<sup>18</sup> *Id.* at TSDR 24-39.

<sup>19</sup> *Id.* at TSDR 40-47

<sup>20</sup> *Id.* at TSDR 48-49.

<sup>21</sup> *Id.* at TSDR 50-52.

website (reebok.com) advertises the sale of clothing<sup>22</sup> and yoga mats.<sup>23</sup> The workout videos are not activities designed to educate the general public, patients and health care professionals on the importance of exercise and proper nutrition and emotional well-being.

The Examining Attorney contends that Adidas uses the ADIDAS mark with “classes designed to educate the general public, patients and health care professionals on the importance of exercise, under its own mark.”<sup>24</sup> As best we can tell from the submission, these are just workout videos “designed to give you a quick sweat session when you’re on the go,” not videos designed to educate.<sup>25</sup>

The Examining Attorney also specifically refers to the Athleta evidence as displaying the ATHLETA mark used in connection with “classes and workshops designed to educate the general public, patients and health care professionals on the importance of exercise, under its own mark.”<sup>26</sup> As indicated above, the feature regarding Alli Simon is a human-interest story about a woman using yoga to heal her community. It is not an activity designed to educate about the importance of exercise and proper nutrition and emotional well-being.

We find the evidence is insufficient to show a relationship between Applicant’s goods and the description of services in the cited registration.

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<sup>22</sup> *Id.* at TSDR 53-61.

<sup>23</sup> *Id.* at TSDR 62-65.

<sup>24</sup> Examining Attorney’s Brief (8 TTABVUE 10).

<sup>25</sup> March 12, 2020 Office Action (TSDR 7).

<sup>26</sup> Examining Attorney’s Brief (8 TTABVUE 10).

**IV. Established, likely-to-continue channels of trade.**

Under Armour, Nike, Adidas, Rebook, and **lululemon** post their exercise videos on YouTube but advertise the sale of their exercise and yoga clothing and gear on their own websites. The Examining Attorney argues, however, that the above-noted evidence “establishes that same entity commonly offers and markets the relevant goods and services under the same mark and through the same trade channels to the same classes of consumers.” Although the goods and services appear on the Internet, the third parties post the goods and services on distinct websites and, thus, the evidence is not sufficient to establish an overlap in the channels of trade. *See Bond v. Taylor*, 119 USPQ2d 1049, 1054 (TTAB 2016) (quoting *Parfums de Couer Ltd. v. Lazarus*, 83 USPQ2d 1012, 1021 (TTAB 2007) (“[T]he mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade. The Internet is such a pervasive medium that virtually everything is advertised and sold through the Internet.”)).

We find, therefore, that third parties offer the relevant goods and services in different channels of trade.

**V. The conditions under which and buyers to whom sales are made.**

Applicant contends that the average customers are discriminating purchasers because the goods and services at issue are relatively expensive and, therefore, “more care is taken and buyers are less likely to be confused as to source or affiliation.”<sup>27</sup>

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<sup>27</sup> Applicant’s Brief, pp. 5-6 (6 TTABVUE 6-7).

The evidence does not support Applicant's contention that the products within its description of goods are expensive. For example,

- Under Armour advertises the sale of women's yoga and studio tops for \$20-\$65.<sup>28</sup> Nike advertises the sale of women's training tops for \$35-\$60, training tights for \$55-\$90, and sports bras for \$35-\$50.<sup>29</sup> Adidas advertises the sale of training pants for \$20-\$45 and a sports bra for \$18.<sup>30</sup> Reebok advertises the sale of women's pants for \$45-\$300.<sup>31</sup>

- **lululemon** advertises the sale of yoga mats for \$68-\$78.<sup>32</sup> Adidas advertises the sale of yoga mats for \$28.<sup>33</sup> Nike advertises the sale of training mats for \$60.<sup>34</sup> Reebok advertises the sale of yoga mats for \$20.<sup>35</sup> Athleta advertises the sale of a hand yoga towel for \$18, a mat towel for \$42.<sup>36</sup>

Because Applicant's descriptions of goods are not limited to any particular price point, we must treat the goods as including inexpensive as well as more costly exercise and yoga clothing and gear, and therefore presume that purchasers for products include ordinary consumers who may buy inexpensive exercise and yoga

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<sup>28</sup> September 14, 2019 Office Action (TSDR 34-36).

<sup>29</sup> September 14, 2019 Office Action (TSDR 54-62).

<sup>30</sup> March 12, 2020 Office Action (TSDR 11 and 21).

<sup>31</sup> March 12, 2020 Office Action (TSDR 53-60).

<sup>32</sup> September 14, 2019 Office Action (TSDR 24).

<sup>33</sup> March 12, 2020 Office Action (TSDR 19).

<sup>34</sup> September 14, 2019 Office Action (TSDR 60).

<sup>35</sup> March 12, 2020 Office Action (TSDR 62).

<sup>36</sup> March 12, 2020 Office Action (TSDR 49).

clothing and gear on impulse. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014) (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”). *See also In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that not all purchasers of wine may be discriminating because while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

With respect to the cost of the services in the cited registration, there is no evidence. All we have is counsel’s argument. “Attorney argument is no substitute for evidence.” *Cai*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

This *DuPont* factor is neutral.

#### **VI. The nature and extent of any confusion.**

Applicant asserts, “[t]here have been no documented evidence that shows that any consumers have confused the respective marks in commerce. There have been no demonstrated events of confusion by consumers between the respective marks.”<sup>37</sup>

The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant and Registrant of their marks

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<sup>37</sup> Applicant’s Brief, p. 7 (6 TTABVUE 8).

for a significant time in the same markets. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to occur. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enters. Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. N. Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“[T]he absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring.”). In this appeal, there has been less than two years of simultaneous use and the record is devoid of any probative evidence relating to the extent Applicant and Registrant have used their respective marks. Thus, there is no evidence regarding opportunities for instances of actual confusion to have occurred in the marketplace.

The Federal Circuit has addressed the question of the weight we should give to an assertion of no actual confusion by an applicant in an *ex parte* proceeding:

With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there

was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context.

*Majestic Distilling*, 315 USPQ2d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not compelling in support of a finding of no likelihood of confusion. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

## **VII. Conclusion**

Despite the fact the marks are legally identical, because the evidence of record is insufficient to support finding the goods and services are related or that Applicant and Registrant offer their goods and services in the same channels of trade, it is unlikely that the same consumers would encounter both marks under circumstances likely to give rise to the mistaken belief that the goods and services emanate from the same source. Therefore, we find that Applicant's mark SHAKTI WARRIOR for the exercise and yoga clothing and gear set forth in its application is not likely to cause confusion with the registered mark SHAKTI WARRIORS for, inter alia, "educational services, namely, providing public appearances, classes, seminars, and workshops designed to educate the general public, patients and health care professionals on the importance of exercise and proper nutrition and emotional well-being and distributing corresponding educational materials."



Serial No. 88459695

**Decision:** We reverse the Section 2(d) refusal to register Applicant's mark  
SHAKTI WARRIOR.