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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Thore Unlimited, LLC

Serial No. 90599769[1]

David W. Sar, of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP,
for Thore Unlimited, LLC.

Fong Hsu, Trademark Examining Attorney, Law Office 129,
Pamela Y. Willis, Managing Attorney.

Before Wolfson, Pologeorgis, and English,
Administrative Trademark Judges.

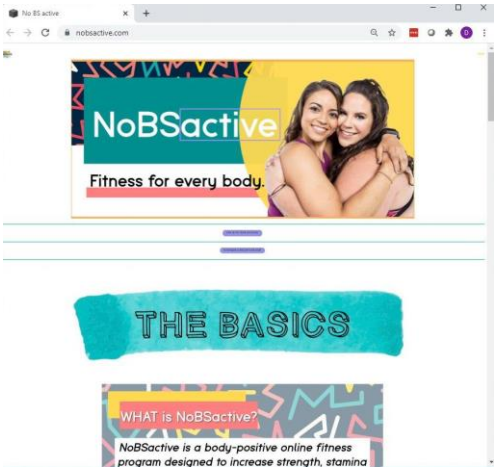
Opinion by Wolfson, Administrative Trademark Judge:

Thore Unlimited, LLC ("Applicant") seeks to register on the Principal Register the standard character mark NOBSACTIVE for "Yoga mats" in International Class 27 and "Educational services, namely, providing on-line and streamed classes and videos in the field of physical fitness, nutrition and health, not including yoga instruction; Educational services, namely, providing online instruction in the field of physical

[1] This application is the parent of Serial No. 90977849, which was published on October 18, 2022, allowed on December 13, 2022, and currently is pending the filing of a statement of use.

fitness, nutrition and health via an online website, not including yoga instruction" in International Class 41.[2]

The application was filed on the basis of Applicant's bona fide intent to use the mark in commerce on yoga mats under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), and on the basis of Applicant's first use and use in commerce of the mark in association with educational services at least as early as January 1, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). Applicant identified the specimen filed with the application in support of the International Class 41 services as "webpage excerpts concerning the services, a social media post concerning the services, and a screenshot of a video of the services." TEAS Plus New Application, March 24, 2021, TSDR 1.[3] The specimen is reproduced below:[4]



[2] Application Serial No. 90599769, filed March 24, 2021

[3] All citations to the prosecution history of the application are to pages from the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). Citations to the appeal record are to TTABVUE, the docket history system for the Trademark Trial and Appeal Board ("TTAB").

[4] The smaller print reads: "NoBSactive is a body-positive online fitness program designed to increase strength, stamina."

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's applied-for mark is confusingly similar to two marks registered on the Principal Register by a single entity: the standard character mark NO BS WOMEN ("WOMEN" disclaimed) and the composite mark NO BS WEIGHTLOSS PROGRAM and design (depicted below) ("WEIGHTLOSS PROGRAM" disclaimed).[5]

Both marks are registered for, inter alia:

> Education services, namely, providing live and on-line seminars, retreats, interactive courses and classes, ecourses, coaching, conferences, workshops, and webinars in the field of weight loss, weight control, nutrition, health and lifestyle wellness; Entertainment services, namely, providing podcasts in the field of weight loss, weight control, nutrition, health and lifestyle wellness; Providing online newsletters in the field of weight loss, weight control, nutrition, health and lifestyle wellness via e-mail; Providing a website featuring blogs and non-downloadable publications in the nature of articles and advice columns in the field(s) of weight loss, weight control, nutrition, health and lifestyle wellness in International Class 41.

When the refusal was made final, Applicant filed a notice of appeal and requested reconsideration. November 23, 2022 Request for Reconsideration, TSDR 1-57.

[5] NO BS WOMEN registered under Registration No. 6494828 on September 21, 2021. NO BS WEIGHTLOSS PROGRAM and design registered under Registration No. 6300305 on March 23, 2021. Following Applicant's submission of its appeal brief, the Examining Attorney withdrew his refusal on the basis of Reg. Nos. 6151637 and 5300371 and they are no longer a bar to registration under Section 2(d).

Following the Examining Attorney's refusal of Applicant's Request for Reconsideration, 4 TTABVUE, the appeal resumed. 5 TTABVUE. Both Applicant and the Examining Attorney filed briefs, 6 and 10 TTABVUE, and Applicant filed a reply brief. 11 TTABVUE. For the reasons explained below, we affirm the refusal to register in Class 41 and reverse the refusal in Class 27.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *2 (TTAB 2019). "Not all *DuPont* factors are relevant in each case[.]" *Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020).

Two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004), *cited in Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at *5 (TTAB 2019); *see also In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1628 (TTAB 2018) (citing *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.")).

We also consider Applicant's assertion that there has been no actual confusion among the marks despite Applicant's ownership of the following registrations:

> (a) Reg. No. 4881469 for the composite mark depicted below for, inter alia, "Promoting public interest and awareness of the importance of respecting people of all body types and of self-affirmation regarding one's own body," in Class 35; "Educational and entertainment services, namely, providing motivational speaking services in the field of positive self-esteem regarding one's body and respecting others regardless of their appearances," in Class 41. Registered January 5, 2016; Section 8 affidavit accepted.
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> (b) Reg. No. 5139772 for the standard character mark NO BODY SHAME for "Promoting public interest and awareness of respecting people who are obese and of self-affirmation despite one's obesity," in Class 35; "Educational and entertainment services, namely, providing motivational speaking services in the field of positive self-esteem despite one's obesity and respecting people who are obese," in Class 41. Registered February 14, 2017; Section 8 & 15 affidavit accepted and acknowledged.[6]

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[6] Applicant's asserted Reg. No. 4901018 for the mark 

in Class 25 has been cancelled. Thus, it has very little probative value in regard to Applicant's lack of actual confusion argument, except insofar as the registration was a live registration from February 16, 2016 to August 26, 2022. A cancelled or expired registration is "only evidence that the registration issued and does not afford its owner any legal presumptions under [Section] 7(b)." *Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989).

A. Relatedness of the Services; Trade Channels; Classes of Consumers

Turning first to the Class 41 services, channels of trade and classes of consumers, we note the services are in-part identical, as Applicant and Registrant both offer classes in health and nutrition. Applicant's identification includes "providing on-line and streamed classes … in the field of physical fitness, nutrition and health, not including yoga instruction," and Registrant's identification includes "providing live and on-line … classes … in the field of weight loss, weight control, nutrition, health and lifestyle wellness."

Neither identification includes any limitations with respect to channels of trade or intended consumers. If an application or registration describes goods or services broadly, and there is no limitation as to their nature, it is presumed that the registration or application "encompasses all goods or services of the type described." *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013), *quoted in Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *15-16 (TTAB 2023); *see also In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018) ("[W]here the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein.") (internal quotes omitted).

Applicant argues that because it focuses on "body positivity and body acceptance, regardless of shape, size, and bodily aesthetics" while Registrant focuses on weight loss, "in opposition to those offered under the Applied-For Mark," consumer confusion as to the source of those goods and services "is unlikely." 11 TTABVUE 7. This

argument is unavailing. An applicant may not restrict the scope of the services covered in its application by argument or extrinsic evidence. *In re Midwest Gaming & Entm't*, 106 USPQ2d 1163, 1165 (TTAB 2013) ("It is settled that '... it is the identification of [services] that controls, not what extrinsic evidence may show about the specific nature of the [services]'") (quoting *In re La Peregrina Ltd.,* 86 USPQ2d 1645, 1647 (TTAB 2008), *In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763, 764 (TTAB 1986)). Thus, any specific differences between the actual nature of the services and how they may be marketed are irrelevant in our analysis. As noted above, neither Applicant's nor Registrant's recitation of services includes any limitations as to the intended message to be conveyed by the marks.

Further, because Applicant's and Registrant's services are in-part identical, we must presume that the channels of trade and classes of purchasers for those services are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are identical [services], the channels of trade and classes of purchasers are considered to be the same); *Am. Lebanese Syrian Assoc'd Charities Inc. v. Child Health Rsch. Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

The in-part identity of Applicant's and Registrant's services and their overlapping channels of trade and classes of purchasers not only weigh in favor of a finding of likelihood of confusion, but also reduce the degree of similarity between the marks

necessary to find a likelihood of confusion in Class 41. *See Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

The second and third *DuPont* factors favor a finding of likelihood of confusion with respect to Applicant's services in Class 41.

A different finding is made in Class 27. Nowhere in his brief does the Examining Attorney address Applicant's "yoga mats," or explain the basis of his refusal with respect to these goods. "'Because each class in Applicant's multi-class application is, in effect, a separate application, we consider each class separately, and determine whether [the Examining Attorney] has shown a likelihood of confusion with respect to each.'" *In re OSF Healthcare Sys.*, 2023 USPQ2d 1089, at *3 (TTAB 2023) (quoting *N. Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1228 (TTAB 2015)). Although the goods and services "need not be identical or even competitive to find a likelihood of confusion," *Country Oven*, 2019 USPQ2d 443903, at *4 (citations omitted), the Examining Attorney has not provided any evidence of relatedness, such as "news articles or evidence from computer databases showing that the relevant goods [and services] are used together or used by the same purchasers; advertisements showing that the relevant goods [and services] are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant's goods and the [services] listed in the cited registration." *In re Embiid*, 2021 USPQ2d 577, at *22-23 (TTAB 2021) (quoting *In re Ox Paperboard, LLC,* 2020 USPQ2d 10878, at *5 (TTAB 2020)).

Likewise, the Examining Attorney has not addressed the trade channels or classes of purchasers for yoga mats vis-à-vis educational services, or provided any evidence regarding same.

Nor can we surmise from the face of the recitations that "yoga mats" and any of Registrant's services are related, or that the trade channels are similar or purchasing classes the same. The closest services of the cited registrations are in Class 41: "live and on-line seminars, retreats, interactive courses and classes, ecourses, coaching, conferences, workshops, and webinars in the field of weight loss, weight control, nutrition, health and lifestyle wellness." Nothing in the record suggests that such service provider would also manufacture or offer yoga mats. The cited registrations also include the provision of podcasts in the same fields; online newsletters in the same fields; and a website featuring blogs and non-downloadable publications in the same fields. No evidence has been presented to show a connection between a provider of these services and yoga mats. Finally, Registrant's marks are also registered for "Providing internet chatrooms; Providing on-line forums for transmission of messages among computer users" in International Class 38 (both registrations) and "Downloadable educational course materials in the field of weight loss, weight control, nutrition, health and lifestyle wellness" in International Class 9 (Reg. No. 6300305). These goods and services are farther in kind from "yoga mats" than are Registrant's other services.

Accordingly, we find *DuPont* factors two and three favor a finding of no likelihood of confusion with respect to Applicant's Class 27 goods, "yoga mats."

B. Similarity of the Marks

Turning to the first *DuPont* likelihood of confusion factor, a comparison of the marks involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). "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) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019).

Applicant's mark as applied for is NOBSACTIVE. Applicant argues that "consumers are just as likely to view [the letters N-O-B-S in its mark] as an arbitrary or fanciful term NOBS (pronounced "knobs") rather than No [space] B [space] S [space], since the Applied-For Mark does not separate out any of the words or letters in the mark." 6 TTABVUE 11. We are not persuaded by this argument. Despite the mark's depiction in the drawing as all one word, it is clear from the specimens and Applicant's own arguments comparing the marks, that consumers will perceive Applicant's mark as NO BS ACTIVE and not NOBSACTIVE. Moreover, inasmuch as Applicant's mark is presented in standard character form, the rights associated with the mark reside in the wording and not in any particular display. *In re RSI Sys., LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012,

2015 (TTAB 1988).[7]

We consider that Applicant's mark will likely be displayed as "NoBSactive." The specimens depict the mark in this fashion, clearly distinguishing the letters "BS" from the rest of the mark by displaying these letters in uppercase followed by the word "active" in lower case, and by preceding the letters "BS" with the word "No" in upper-lower case. It is not improper to consider the impression an applicant's mark will make on prospective consumers by referring to how the mark appears in a specimen of record.[8] *Cf. In re Vox Populi Registry Ltd.*, 2022 USPQ2d 115, at *2 (Fed. Cir. 2022) ("In analyzing whether a proposed mark functions as a source identifier, the Board focuses on consumer perception."); *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d. 965, 128 USPQ2d 1370, 1375 (Fed. Cir. 2018) (applicant's online marketing and advertising materials supported finding of descriptiveness); *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) ("the TTAB did not err by considering the explanatory text of the specimens in the descriptiveness inquiry"). Applicant's specimens are probative in indicating how the public perceives the mark.

Secondly, there is no evidence that combining "nobs" and "active" into a single

[7] Under Trademark Rule 2.52(a), 37 CFR 2.52(a), standard character marks are registrable "without claim to any particular font style, size, or color." Using a variety of interchangeable upper-lower case letters qualifies as a "font style."

[8] "Ordinarily, for a word mark we do not look to the trade dress, which can be changed at any time." *Vornado, Inc. v. Breuer Electric Mfg. Co.*, 390 F.2d 724, 156 USPQ 340, 342 (CCPA 1968). "But the trade dress may nevertheless provide evidence of whether the word mark projects a confusingly similar commercial impression." *Id.; see also Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984).

term without a space results in the mark creating a commercial impression any different from "NoBSactive." This is because "no bs" and "active" have been shown to have specific meanings. *See* November 9, 2021 Office Action, TSDR 16-23 (definition of "active" in online merriam-webster.com dictionary as "characterized by action rather than by contemplation or speculation") and Applicant's Reply Brief, 11 TTABVUE 3 ("'No B.S.' is a common phrase in general parlance."); *see also In re Aquamar, Inc.* , 115 USPQ2d 1122, 1125 (TTAB 2015) (MARAZUL no different than MAR AZUL); *In re A La Vieille Russie Inc.*, 60 USPQ2d 1895, 1897 n. 2 (TTAB 2001) ("the compound term RUSSIANART is as merely descriptive as its constituent words, 'Russian Art'").

Registrant's marks are NO BS WOMEN and 

. Applicant's mark may be viewed as NoBSactive. The marks are thus similar in appearance and pronunciation because they share the phrase "NO BS." Although marks must be considered in their entireties, it is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the mark's commercial impression. *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1037 (TTAB 2016); *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears

to be unavoidable."). Here, the phrase "NO BS" is the dominant feature of each of the respective marks.

Consumers are likely to focus on this phrase rather than the disclaimed terms "WOMEN" and "WEIGHTLOSS PROGRAM," because these terms are merely descriptive or generic of a feature or characteristic of the services, namely that they are geared toward women or involve programs for losing weight. Similarly, the term "ACTIVE" in Applicant's mark describes Applicant's educational services in the field of "physical fitness." "That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark." *Nat'l Data*, 224 USPQ at 751; *see also, e.g.*, *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) ("DELTA," not the disclaimed generic term "CAFE," is the dominant portion of the mark THE DELTA CAFE).

Applicant argues that "NOBS / NO B S is likely the least important portion of the marks because 'NO BS' is generally viewed as a descriptive or highly suggestive phrase" that is "commonly understood to mean 'no bull shit,' which is a relatively common phrase." Applicant's Brief, 6 TTABVUE 9. Because it is a common phrase, Applicant contends "consumers are unlikely to remember any of the marks as 'NOBS / NO B S' alone." *Id.* Even if true, the dominant portion of each mark is the phrase NO BS; the remaining portions of the marks are less significant. As noted, in Registrant's standard character mark, NO BS WOMEN, "women" indicates the target audience for the services. In the composite mark, 

, the words

"weightloss program" are descriptive if not generic for the services, and the remainder of the mark (the design elements) are simple geometric shapes that serve as mere carriers or background for the words.

Applicant argues that "weightloss program" takes up "the most visual space and appears in the middle of the mark; as such, the eye is naturally drawn to those words first." 11 TTABVUE 7. Nonetheless, the size and position of these words does not obviate the similarity between the marks because "weightloss program" has no source significance as a brand; it is at best merely descriptive. Consumers need look to the "NO BS" portion of the mark to identify the source of origin of the services. The term "ACTIVE" in Applicant's mark likewise describes the nature of Applicant's physical fitness classes and is less significant than the phrase "NO BS" in creating the commercial impression of the mark.

Applicant submitted copies of seven active third-party registrations to show that the phrase "NO BS" is too weak to serve as a distinguishing component of the marks. While third-party registrations can be used in the manner of dictionaries to show that a term has some significance in a particular field, they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. *See, e.g.*, *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *DC Comics v. Cellular Nerd LLC*, 2022 USPQ2d 1249, at *71 (TTAB 2022) (third-party registrations may be used in the manner of a dictionary to show that a mark or a portion of a mark is descriptive or suggestive of goods and services).

Here, the third-party registrations are for unrelated goods and services, such as a periodical newsletter focusing on marketing (Reg. No. 3293983), business training in the field of sales (Reg. No. 5884920), "cookies" in Class 30 (Reg. No. 5429387), and "processed fruit- and nut-based food bars" in Class 29 (Reg. No. 5715602). They do not show that "NO BS" is common in the field of health and wellness.

Applicant also submitted evidence of Registrant's use of its composite mark, and evidence that the mark NO BS ACTIVE appears on Applicant's website "nobsactive.com." November 23, 2022 Response to Office Action, TSDR 48-49. In addition, Applicant submitted evidence of third-party use of the mark "NoBS Wellness" for a "no-nonsense podcast about the power of holistic wellness," *id.* at 50; a copy of a webpage from "no-bs-sales-school.mykajabi.com" that touts "Become Better at Sales Today! No B.S. Sales Offers," *id.* at 51; a copy of a webpage from nobsmarketplace.com for electronic equipment, *id.* at 52; and an advertisement for the book "What Is Body Positivity? The Path from Shame to Pride," including an abstract of the book, *id.* at 53-57. This evidence fails to demonstrate, as Applicant contends, that the phrase is so weak in the field of health and wellness that consumers are unlikely to confuse the marks because there is no other commonality between them.

To the contrary, we find NO BS dominant because of the descriptive/generic nature of the rest of the text in both Applicant's and Registrant's marks and due to the weak nature of the design element in the composite mark. Consumers are also likely to focus on the leading literal phrase "NO BS" in Applicant's and Registrant's

marks and be inclined to remember this phrase when calling for the respective services. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"); *Palm Bay*, 73 USPQ2d at 1692 ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

Applicant further argues that its mark has a double entendre, in that "NO BS" can be understood both to mean "no bull shit" and "no body shame." 6 TTABVUE 10. Applicant argues that consumers are likely to view the mark as "no body shame" because Whitney Way Thore, a celebrity known for promotion of a message of body acceptance and positive body image, is operational in Applicant's business. 6 TTABVUE 10. We also note the specimens of use describe "NoBSactive" as a "body-positive online fitness program designed to increase strength, stamina."

However, the evidence is insufficient to support a conclusion regarding consumers' perceptions in this regard. Ms. Thore's prior registration history does not make the meaning of Applicant's mark relate primarily to "no body shame." The consuming public is generally not aware of registrations that reside only in the USPTO's records. *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1160 (TTAB 2018) (citing *Nat'l Data*, 224 USPQ at 751); *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ

462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the USPTO). Moreover, whether the public is likely to be aware of a connection between Ms. Thore and Applicant has not been established, and the specimens do not equate "BS" with "body shame."

When compared in their entireties, we find the marks similar in appearance, pronunciation, connotation and overall commercial impression because they suggest customers will be offered a no-nonsense approach to physical fitness, nutrition and health, including weight loss and weight control. The first *DuPont* factor weighs in favor of finding a likelihood of confusion.

C. Actual Confusion; Applicant's Prior Registrations

Under the seventh and eighth *DuPont* factors, i.e., the nature and extent of any actual confusion and the length of time during and conditions under which there has been concurrent use without evidence of confusion, Applicant argues that its standard character mark NO BODY SHAME (Reg. No. 5139772) has been in use since January 10, 2014; that its composite mark 

(Reg. No. 4881469) has been in use since April 10, 2015; and that

> there have been no instances of actual confusion between the Cited Marks on one hand, and Applicant's prior registrations or the Applied-For Mark on the other hand. Notably, there was peaceful coexistence without actual confusion between Applicant's NO BS ACTIVE Logo Mark, though each of the Cited Marks claim first use dates ranging from 2017 through 2020.[9] Similarly, there has

[9] This is a reference to the four original registrations that were cited against Applicant's mark. The asserted date of first use in commerce for Registrant's mark NO BS WOMEN is

> been peaceful coexistence without actual confusion between Applicant's NO BS Logo Mark and all of the cited registrations. This is evidence of years of peaceful coexistence without confusion.

6 TTABVUE 19 (citation omitted).

The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis because the Board has no way of knowing whether the registrant likewise is unaware of any instances of actual confusion. *See, e.g., Detroit Athletic*, 128 USPQ2d at 1047 (citing *In re Majestic Distilling Co.,* 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ("The lack of evidence of actual confusion carries little weight, especially in an ex parte context."(internal citation omitted)); *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Jeep Corp.*, 222 USPQ 333, 337 (TTAB 1984). Further, even if Applicant had proven actual use of its marks from 2014 or 2015, which it has not, Registrant's registrations did not issue until 2021 and Applicant has not shown any earlier use of its or Registrant's marks (the pages from Applicant's and Registrant's websites bear access dates of 11/23/2022, which in any event are unverified).[10] Thus, any period of concurrent use would be far too short to establish a meaningful opportunity for confusion to have occurred.

March 31, 2020 and the asserted date of first use in commerce for Registrant's composite mark is June 17, 2020.

[10] The asserted dates of first use in commerce for Registrant's marks are of no import, because dates of use in an application are not evidence that the mark was in use from that date. Trademark Rule 2.122(b)(2), 37 C.F.R. § 2.122(b)(2) ("The allegation in an application for registration ... of a date of use is not evidence on behalf of the applicant ... ; a date of use of a mark must be established by competent evidence."); *WeaponX Performance Prods. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1042 (TTAB 2018). Even if they were evidence, however, the dates are too recent to support Applicant's position.

DuPont factors seven and eight are neutral.

Under the thirteenth *DuPont* factor, the Board may consider "'any other established fact probative of the effect of use,'" *Country Oven*, 2019 USPQ2d 443903, at *15, and "'accommodates the need for flexibility in assessing each unique set of facts . . . .'" *Id.* (quoting *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012)). This includes the coexistence of an applicant's prior-registered mark with a 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 *In re Inn at St. John's*, 126 USPQ2d at 1748 (internal citation omitted)).

Here, there are meaningful differences between Applicant's registered marks (NO BODY SHAME and 

) and the mark of the subject application. In addition, the registrations are for services of promoting "public interest and awareness of the importance of respecting people of all body types and of self-affirmation regarding one's own body" and of providing "motivational speaking services in the field of positive self-esteem regarding one's body and respecting others regardless of their appearances," which materially differ from those of the subject application, i.e., providing "on-line and streamed classes and videos in the field of physical fitness, nutrition and health" and instruction in these fields. *See, e.g., Strategic Partners*, 102 USPQ2d at 1399 (goods were identical; no meaningful differences in marks).

DuPont factor thirteen is neutral.

II. Conclusion

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. The marks are similar in sight, sound, meaning and overall commercial impression. The services are identical in part and are presumed to be sold in the same trade channels to the same classes of consumers. In Class 41, these factors weigh in favor of likelihood of confusion. In Class 27, these factors weigh against a finding of likelihood of confusion, inasmuch as the goods have not been proven to be related or sold through similar trade channels to the same classes of purchasers. *DuPont* factors seven, eight and thirteen are neutral.

We conclude that prospective consumers are likely to confuse Applicant's services as originating from, associated with, or sponsored by the same entity as Registrant's services, when offered under the NOBSACTIVE mark. On the other hand, we conclude, based on the present record, that prospective consumers are unlikely to confuse Applicant's yoga mats with Registrant's services.

Decision: The Section 2(d) refusal to register Applicant's mark is affirmed with respect to the Class 41 services and reversed with respect to the Class 27 goods. The application will proceed on the Class 27 goods only.