

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

Brick Bodies Fitness Services, Inc.  
v.  
BRIK Fitness Solutions, LLC

Opposition No. 91208694  
to application Serial No. 85594830

Ronald E. Shapiro of Shapiro & Silverstein PLLC for Brick Bodies Fitness Services, Inc.

Jerome V. Sartain of One3 IP Management, P.C. for BRIK Fitness Solutions, LLC.

Before Seeherman, Cataldo and Masiello, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

BRIK Fitness Services, Inc. (“Applicant”) has applied to register BRIKFITNESS, as shown below:<sup>1</sup>



<sup>1</sup> Application Serial No. 85594830, filed April 11, 2012, asserting first use on March 19, 2012 and first use in commerce on March 25, 2012.

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The description of the mark entered in the application is:

The mark consists of a grey circle with a streak of white cutting from the top left to the bottom right of the circle and four partial burgundy-outlined bricks, whose outlines form a "B" and an "F" side by side. The circle casts a grey shadow directly underneath the circle. To the right of the circle is the word "brikfitness" with the word "brik" in thick burgundy letters and the word "fitness" in black thin letters, all lower case.

The services, all in Class 41, are as follows:

Conducting fitness classes; Consulting services in the fields of fitness and exercise; Personal fitness training services and consultancy; Personal fitness training services featuring aerobic and anaerobic activities combined with resistance and flexibility training; Physical fitness conditioning classes; Physical fitness consultation; Physical fitness instruction; Physical fitness studio services, namely, providing exercise classes, body sculpting classes, and group fitness classes; Physical fitness studio services, namely, providing group exercise instruction, equipment, and facilities; Physical fitness training of individuals and groups; Physical fitness training services; Providing fitness and exercise facilities.

Brick Bodies Fitness Services, Inc. ("Opposer") has opposed registration of the mark on the ground of likelihood of confusion, alleging that Opposer owns a family of marks that feature the term BRICK or BRICK'S, which Opposer uses with a variety of health and fitness-related services, including health club services and providing exercise classes and personal training; that Opposer owns registrations for the marks BRICK BODIES, LYNNE BRICK'S, BUILD YOUR BODY WITH BRICK and BRICK BODIES EXTREME; that Opposer has used each of its marks since prior to the date of first use claimed in Applicant's application; and that Applicant's services are identical or closely related to Opposer's services.

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In its answer, Applicant denied the salient allegations of the notice of opposition, and asserted “affirmative defenses” which are primarily amplifications of its denials.

By operation of the rules, the record includes the pleadings and the file of the opposed application. The parties have also submitted evidence under notices of reliance, and both have agreed that the material submitted by notice of reliance is of record. *See* Opposer’s brief, 10 TTABVUE 7; Applicant’s brief, 14 TTABVUE 8-9. Therefore, to the extent that any of the submitted materials would not be acceptable for submission under notice of reliance, we deem the parties to have stipulated to their introduction.

Opposer has made of record copies of its pleaded registrations, showing status and title, taken from the electronic database of the U.S. Patent and Trademark Office, to wit:

MARK	GOODS/SERVICES
BRICK BODIES (typed drawing)	T-shirts, leotards, shorts, sport shirts, jackets and hats (Class 25) Educational services; namely, conducting exercise and physical fitness classes; providing exercise and physical fitness training; conducting classes for exercise and physical fitness (Class 41) <sup>2</sup>
LYNNE BRICK’S (standard characters)	Health club services, namely, providing instruction and equipment in the field of physical exercise; Physical fitness studio services, namely, providing exercise classes, body sculpting classes, and group fitness classes; Physical fitness studio services, namely, providing group exercise instruction, equipment, and facilities; Providing a website

<sup>2</sup> Registration No. 1797663, issued October 12, 1993; renewed twice. The registration had originally included goods and services in Classes 9, 16, 35 and 42, but they have been cancelled from the registration.

	<p>featuring information on exercise and fitness; Providing an on-line computer database featuring information regarding exercise and fitness; Providing assistance, personal training and physical fitness consultation to corporate clients to help their employees make physical fitness, strength, conditioning, and exercise alterations in their daily living; Providing assistance, personal training and physical fitness consultation to individuals to help them make physical fitness, strength, conditioning, and exercise improvement in their daily living; Providing fitness and exercise facilities; Providing fitness and exercise studio services, namely, pilates instruction and training (Class 41)<sup>3</sup></p>
<p><b>BUILD YOUR BODY WITH BRICK</b> (standard characters)</p>	<p>Health club services, namely, providing instruction and equipment in the field of physical exercise; Physical fitness studio services, namely, providing exercise classes, body sculpting classes, and group fitness classes; Physical fitness studio services, namely, providing group exercise instruction, equipment, and facilities; Providing a website featuring information on exercise and fitness; Providing an on-line computer database featuring information regarding exercise and fitness; Providing assistance, personal training and physical fitness consultation to corporate clients to help their employees make physical fitness, strength, conditioning, and exercise alterations in their daily living; Providing assistance, personal training and physical fitness consultation to individuals to help them make physical fitness, strength, conditioning, and exercise improvement in their daily living; Providing fitness and exercise facilities; Providing fitness and exercise studio services, namely, pilates instruction and training (Class 41)<sup>4</sup></p>
<p><b>BRICK BODIES EXTREME</b> (standard characters)</p>	<p>Physical fitness studio services, namely, providing exercise classes, body sculpting classes, and group fitness classes (Class 41)<sup>5</sup></p>

<sup>3</sup> Registration No. 3922743, issued February 22, 2011.

<sup>4</sup> Registration No. 3922744, issued February 22, 2011.

<sup>5</sup> Registration No. 4048830, issued November 1, 2011.

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The proceeding has been fully briefed.

The record shows that Opposer owns and operates health and fitness clubs. It is a Maryland corporation, and is associated with various entities, all of which have “Brick Bodies” in their name, e.g., Brick Bodies at Perry Hall, LLC, and all have their principal offices in Maryland. Opposer’s response to Applicant’s Interrogatory No. 1.

Applicant is a health and wellness facility that focuses on fat loss and corrective exercise. Applicant’s response to Opposer’s Interrogatory No. 1. The term BRIK in Applicant’s mark was derived from the first names of the original owners, Brian Nguyen and Nik Herold. Applicant’s response to Interrogatory No. 5.<sup>6</sup>

In view of its ownership of its pleaded registrations, Opposer has shown that it has a real interest in the proceeding, and therefore has established its standing. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Further, because of Opposer’s registrations, priority is not in issue. *See King Candy Company v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

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<sup>6</sup> In its notice of reliance, 7 TTABVUE 6, Applicant stated that this Interrogatory response had been made of record by Opposer’s notice of reliance. In fact, although Opposer included the entirety of Applicant’s responses to Opposer’s first set of interrogatories with its notice of reliance, Opposer actually made of record only Applicant’s responses to Interrogatories 1, 3 and 4. *See* 5 TTABVUE 3. However, as noted previously, Opposer treated the entirety of Applicant’s notice of reliance as being of record, and therefore the two interrogatory responses relied on by Applicant and filed with Opposer’s notice of reliance are of record.

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This brings us to the issue of likelihood of confusion. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

The services are in part identical and in part closely related. For example, Applicant's "conducting fitness classes" is the same as or encompassed by the "conducting exercise and physical fitness classes" identified in Opposer's BRICK BODIES registration, and the "providing exercise classes" identified in Opposer's remaining three registrations. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application). Applicant does not dispute the similarity of the services: "Applicant would contend that notwithstanding the similarities between the services of the parties, confusion is yet unlikely...." Brief, 14 TTABVUE 16. Thus, this *du Pont* factor favors a finding of likelihood of confusion.

Because the services are in part identical, they must be deemed to travel in the same channels of trade. *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). Applicant argues that its services are rendered in California and Opposer's are rendered in Maryland, and because the services are rendered in different physical locations, there is "little if any opportunity

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for relevant consumers to encounter the marks at the same time or in the same purchasing decision.” Brief, 14 TTABVue 19. Essentially, Applicant is asserting that the channels of trade are different because the parties’ services are rendered in different geographical areas. This argument might have some validity if this were a concurrent use proceeding in which the parties were seeking registrations restricted to separate geographic areas. However, Opposer’s registrations are nationwide in scope, and Applicant is also attempting to obtain a geographically unrestricted registration. With such a registration, Applicant would be free to use its mark anywhere in the United States, including the area in which Opposer uses its marks. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990 (The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to ... the particular channels of trade....”). The *du Pont* factor of the channels of trade favors a finding of likelihood of confusion.

We next turn to the primary factors that Applicant contends avoid likelihood of confusion, the similarities/dissimilarities of the marks, the strength of Opposer’s marks, and the number and nature of similar marks in use on similar goods. Essentially, Applicant argues that Opposer’s marks are not entitled to a broad scope of protection, and therefore the similarities

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between the parties' marks are not a sufficient basis on which to find likelihood of confusion.

First, we point out that, although Opposer has pleaded that it has a family of BRICK marks, it has not proved this claim. Although Opposer has shown that several of its pleaded marks are used together on its website, e.g., BUILD YOUR BODY WITH BRICK, BRICK BODIES, and LYNNE BRICK'S appear on the same webpage that was submitted as Exhibit B to Opposer's notice of reliance, 5 TTABVUE 14,<sup>7</sup> Opposer has not submitted any information about the public's exposure to these materials, including hits on the webpages, such that we can conclude that the public would view Opposer's marks as being part of a BRICK family. Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods or services. *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). Accordingly, in considering the first *du Pont* factor, we must compare Opposer's individual marks with Applicant's mark.

With respect to the strength of the marks, Applicant asserts that BRICK in Opposer's marks is a surname, and therefore is a weak mark.<sup>8</sup> There is no

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<sup>7</sup> Opposer states that this exhibit is the specimen for the Section 8 affidavit for its Registration No. 1797663 for BRICK BODIES.

<sup>8</sup> We do not view this argument as an impermissible collateral attack on Opposer's registrations, since Applicant is not claiming that the marks as a whole are primarily merely surnames, but only that the term BRICK in these marks is a surname.

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question that BRICK is the last name of Opposer's founders, Lynne and Victor Brick, and that the mark LYNNE BRICK'S is derived from Ms. Brick's name. Opposer's response to Interrogatory No. 5. However, BRICK can by no means be considered primarily merely a surname, since it has a clearly understood meaning as a common object, a hardened clay block.<sup>9</sup> Further, in three of the marks, BRICK would just as likely, or more likely, be understood as having the "block of hardened clay" meaning, while in the LYNNE BRICK'S mark the mark as a whole would be understood as referring to an individual, rather than as a surname.

Applicant has submitted pages from five third-party applications and registrations for marks that contain the element BRICK. Only two of these are registrations, BRICKHOUSE CARDIO CLUB in standard characters for "personal fitness training services featuring aerobic and anaerobic activities combined with resistance and flexibility training"<sup>10</sup> and BRICK CANVAS for "fitness and exercise studio services, namely, yoga instruction and training," and for various health spa services.<sup>11</sup> The three third-party applications, all

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<sup>9</sup> We take judicial notice that "brick" is defined, *inter alia*, as "a block of clay hardened by drying in the sun or burning in a kiln, and used for building, paving, etc.: traditionally, in the U.S. a rectangle 2.25 x 3.75 x 8 inches (5.7 x 9.5 x 20.3 cm), red, brown or yellow in color." Dictionary.com, based on Random House Dictionary, © 2014. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>10</sup> Registration No. 4059131, Exhibit A to Applicant's notice of reliance, 9 TTABVUE 8.

<sup>11</sup> Registration No. 4314521, Exhibit C to Applicant's notice of reliance, 9 TTABVUE 38.

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of which are “dead” due to abandonment or an opposition being sustained, are for BRICKHOUSE with the H in the form of a house, BRICK SPORT PERFORMANCE TRAINING and BRICKYARD GYM. The third-party applications have probative value only to show that the applications were filed. *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1360 (TTAB 2014). As for the two registrations, third-party registrations can be used, in the same manner as dictionaries, to show that a mark, or an element in a mark, has a meaning or significance within a particular industry. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). However, the existence of two third-party registrations, without more, would not be sufficient to show this.

Applicant appears to rely on the third-party applications and registrations to show that the examining attorneys examining the respective applications did not cite Opposer’s registrations, and therefore did not believe that there was a likelihood of confusion between Opposer’s registered marks and the third-party marks. However, the fact that certain examining attorneys did not cite Opposer’s registrations against the third-party marks does not bind this Board. The marks involved in those applications and registrations are not the same as Applicant’s mark. We must decide the case before us on its own merits. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

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Applicant has submitted pages from various websites in an attempt to show third-party use. Exhibit I to Applicant's notice of reliance, 7 TTABVue 131, is a webpage that has, as its prominent heading, FITNESS FOR WOMEN on a yellow background with a swirl underlining it. It shows that the third party is located in Brick, NJ. Therefore, consumers are likely to view the term BRICK in text such as "Brick's Best Health Club and Fitness Center for Women Only!" and "Brick Fitness for Women" as referring to the geographic location of the services. Exhibit J is excerpts from a website for a fitness center identified as located in Cooper City, FL called BRICKFIT FITNESS & WELLNESS; Exhibit K is webpages for what appear to be two branches of the same entity, BRICK BRICK in New York and BRICK BRICK in West Hollywood, CA; Exhibit L is a webpage showing the mark BRICKS FITNESS in Minot, ND and listing various exercise classes and equipment, e.g., Zumba, Kettlebells, Yoga, Pilates and Drums Alive; Exhibit M is pages from the website for CROSSFIT BRICK HOUSE FITNESS, located in San Jose, CA; Exhibit N consists of webpages for THE BRICK, which has an address in St. Simons Island, GA, and has the philosophy that "you must go out into the world and lay your bricks perfectly to build the life you want," and that "Everyone should have fitness as one of their bricks." Finally, Exhibit O consists of pages from a website for BRICK CITY HEALTH & FITNESS, which describes itself as a gym serving Ocala (FL) and all of Marion County.

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Third-party use of similar marks on similar goods or services is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005). However, “where the ‘record includes no evidence about the *extent of [third-party] uses* ...[t]he probative value of this evidence is thus minimal.” *Id.*, emphasis and bracketed language in original, quoting *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557 (Fed. Cir. 2001). In this case, the third-party uses appear to be limited in geographic scope, such that we cannot conclude that consumers would be aware of the various third-party uses, and therefore distinguish them based on elements other than the term BRICK that is common to each.

However, the third-party uses can bear on the inherent strength or weakness of an opposer’s mark. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675. Like third-party registrations, the use of a term as a trademark by a number of entities can indicate that it carries a suggestive or descriptive connotation for the particular goods or services. *Id.*, 115 USPQ2d at 1675 (extensive evidence of third-party use and registrations indicates that the term carries a suggestive or descriptive connotation in the particular industry). Although the two third-party registrations discussed above are, alone, not sufficient to show that BRICK has a suggestive or descriptive meaning, the fact that eight third parties have chosen to adopt

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marks or trade names containing the word BRICK indicates that BRICK has a significance in the fitness industry, and this in turn affects the strength to be accorded Opposer's mark. In short, the fact that Opposer's and Applicant's marks both contain the term BRICK (or the variant spelling BRIK) may not, without more, be a sufficient basis to find likelihood of confusion.<sup>12</sup>

With this in mind, we turn to a consideration of the marks. We concentrate our analysis of the similarity or dissimilarity of the marks on Applicant's mark and Opposer's mark BRICK BODIES, because we consider BRICK BODIES to be the closest of Opposer's marks to Applicant's mark. If we find likelihood of confusion with respect to this mark, the opposition will be sustained, and therefore there would be no need for us to consider likelihood of confusion with respect to Opposer's three other pleaded marks. On the other hand, if we find no likelihood of confusion with respect to BRICK BODIES, then *a fortiori* there can be no likelihood of confusion with marks that are not as similar. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

Because of the manner in which the element BRIKFITNESS in Applicant's mark is displayed, i.e., with "the word 'brik' in thick burgundy letters and the word 'fitness' in black thin letters,"<sup>13</sup> the mark will be viewed by consumers as consisting of the two words BRIK and FITNESS. Moreover, the term BRIK will be understood as the word BRICK with a variant

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<sup>12</sup> In any event, we must compare the marks in their entireties.

<sup>13</sup> See the description of the mark provided by Applicant in its application.

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spelling, an understanding reinforced by the design element, which, as Applicant states in its description of the mark, consists of “four partial burgundy outlined bricks.” Further, despite Applicant’s arguments about the significance of the design element, e.g., it appears as the first element of the mark and therefore “is likely to make an impression on and be remembered by customers,” brief, 14 TTABVUE 18, we find that it does not serve to distinguish Applicant’s mark from Opposer’s mark. If a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). That principle is applicable in this case, since the literal component BRIKFITNESS is the portion of the mark that can be articulated. *See In re National 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 a consideration of the marks in their entireties). We are not persuaded by Applicant’s argument that because the letters “B” and “F” appear within the brick design logo, “the actual text portion of the mark is more properly characterized as BF BRIKFITNESS.” *Id.* It is not obvious to us that consumers will view the design as the letters B and F formed by bricks, instead of just four outlined bricks, but even if they did, they are not likely to say the letters “BF” when referring to the mark; if the letters have any

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significance, we find them to primarily reinforce the word portion of the mark inasmuch as they consist of the initial letters of the words Brik Fitness. The brick design, as well, reinforces the word BRIK.

We emphasize, particularly given the suggestive meaning we accord to BRICK for the services at issue, that our conclusion that the marks are similar does not rest solely on the inclusion in the marks of the element BRICK/BRIK. Although we recognize that there are differences in the marks, most notably, that Opposer's mark has the second word BODIES and Applicant's mark has the second word FITNESS, these differences are not sufficient to distinguish the marks. Because these marks are used in connection with physical fitness classes, the words BODIES and FITNESS convey a similar impression. See *Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1457 (Fed. Cir. 1992) (in marks PLAY-DOH and FUN DOUGH, PLAY and FUN convey a very similar impression); *General Mills Fun Group, Inc. v. Channel Companies, Inc.*, 183 USPQ 367, 369 (TTAB 1974) (PLAY FACTORY and FUN FACTORY are substantially similar and create almost identical connotations). This connection between BODIES and FITNESS appears, for example, in the text of the third-party BrickFit website, which states, under Fitness Classes, "Get in shape and create your dream body," 7 TTABVUE 137; the comment on the BRICK BRICK website that "You'll watch your body exceed your expectations," *id.* at 141; and the text on THE BRICK website that "Fitness

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isn't just about looks and weight. It's about building a good foundation for your body....” *Id.* at 152-53.

Accordingly, when the marks are considered in their entirety, and giving due weight to the dominant portions thereof, we find that they convey similar connotations and commercial impressions, and that these similarities outweigh any differences in appearance and pronunciation caused by the words BODIES and FITNESS and the design element in Applicant's mark. Given that the marks are used for legally identical services, we find that the first *du Pont* factor, the similarity of the marks, weighs in favor of a finding of likelihood of confusion. When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In reaching our conclusion that confusion is likely, we have considered the arguments made by Applicant regarding other *du Pont* factors. With respect to the fourth *du Pont* factor, which concerns the conditions of purchase, Applicant argues that consumers will be careful in making their purchasing decisions because of “the impact a health or fitness facility may have on a person physically, not to mention emotionally or psychologically, and the related financial considerations involved in selecting membership in one gym or health club versus another.” Brief, 14 TTABVUE 20. However, Applicant has not submitted any evidence in support of this argument, nor has

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Applicant submitted any evidence in support of its statement that “a gym membership is a contract, and often a relatively long-term one, sometimes committing a member to a year or more and several hundred dollars.” *Id.* Applicant apparently recognizes that it has failed to submit any evidence with respect to this *du Pont* factor, because it has asked us to take judicial notice “of the fact that obtaining a ‘gym membership’ or the like is not an ‘impulse’ purchase, but instead one that is typically given a reasonable degree of care,” and to judicially notice that there has been a “rise of consumer interest in health and fitness.” *Id.* We decline to take judicial notice of these arguments, as they are not facts that are not subject to reasonable dispute. *See* FRE 201(b).<sup>14</sup> In fact, the only evidence we have regarding the cost of health club services is a statement on Opposer’s website that advertises “a zero joining fee.” *See* 5 TTABVUE 14 and 7 TTABVUE 116.

Thus, we cannot treat the consumers for the identified services as careful or sophisticated. Based on the website evidence submitted by Applicant for the parties’ services and those of third parties, we consider the services to be directed to the public at large. Therefore, we find that this *du Pont* factor is either neutral or weighs somewhat in favor of Opposer.

Applicant points to the fact that there is no evidence of actual confusion, and argues that this tips the scales toward a finding that there is no

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<sup>14</sup> The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

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likelihood of confusion. Brief, 14 TTABVUE 21. “The length of time during and conditions under which there has been concurrent use without evidence of actual confusion” is one of the *du Pont* factors. 177 USPQ at 567. However, in this case we have no evidence on which we could base a conclusion that the absence of actual confusion shows that confusion is not likely to occur. Even if we assume that Applicant commenced use of its mark in March 2012, the use date claimed in its application but not established on this record, and continued such use through the close of trial on March 24, 2014 (also not established on this record), this is not an appreciably long period for instances of actual confusion to be brought to the attention of either party. Further, according to Applicant, the parties’ services are currently offered in widely separated geographic areas, and this, rather than the marks’ not being likely to cause confusion, could explain why there has been no actual confusion. *See Peopleware Systems, Inc. v. Peopleware, Inc.*, 226 USPQ 320, 321 (TTAB 1985) (“the absence of evidence of actual confusion is understandable since applicant is headquartered in the state of Washington near Seattle, while opposer’s activities are centered in Minneapolis, Minnesota”). We treat the *du Pont* factors regarding actual confusion and lack of evidence of actual confusion as neutral.

These are the only *du Pont* factors that the parties have discussed and, to the extent that any others may be applicable, we treat them as neutral.

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There is one further argument that was made by Applicant that we must address. Applicant contends that Opposer has maintained this opposition in bad faith and is engaging in a “bullying” tactic because Opposer is effectively claiming exclusive rights to the word BRICK in connection with exercise-and fitness-related services, a claim that Applicant asserts amounts to gross overreaching. Brief, 14 TTABVUE 21. Applicant bases this contention on the fact that, in connection with the examination of the third-party applications discussed above, the examining attorneys did not cite Opposer’s registrations as a bar to the registration of those BRICK marks, and the fact that Opposer brought opposition proceedings against two of those third-party applications, for BRICK SPORT PERFORMANCE TRAINING and BRICKYARD GYM.<sup>15</sup>

As we have previously stated, the fact that examining attorneys have not cited a particular registrant’s registrations against third-party applications has no probative value in terms of our making a decision on likelihood of confusion, nor do we accept Applicant’s argument that if an opposer’s registration was not cited as a bar, an opposer who relies on such registration is guilty of bullying or overreaching. Under that theory, the opposition procedure would essentially be limited to opposers who assert only common

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<sup>15</sup> In its brief Applicant states that a third opposition was brought by Opposer, but acknowledges that evidence of this opposition was not made of record. Applicant claims that this “is competent evidence” under Trademark Rule. 2.122(e). Although Trademark Rule 2.122(e) provides that official records of the USPTO can be made of record under a notice of reliance, this does not mean that a party may submit such materials after its testimony period ends. As a side point, in this case Applicant has only stated what it claims occurred; no records were actually submitted. We have given no consideration to this asserted third opposition, but even if we had it would not affect our decision herein.

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law rights. Although there may be rare situations in which a party misuses the Trademark Act and the procedures of the Trademark Trial and Appeal Board to bring unwarranted proceedings, normally the appropriate method for asserting a claim for misuse is a motion for sanctions brought pursuant to Rule 11(b) of the Federal Rules of Civil Procedure. See also Patent and Trademark Office Rule 11.18. We also point out that normally it is a point in an opposer's favor to show that it has been diligent in protecting its mark, and often a party will submit evidence that it has brought opposition proceedings against third-party marks in support of its case. In the present case, we find that Opposer's actions do not show any "bullying" or untoward conduct.

In conclusion, we find that Applicant's mark, BRIKFITNESS and design, used in connection with its identified services, is likely to cause confusion with Opposer's mark BRICK BODIES for the services identified in Class 41 of Registration No. 1797663. In view thereof, we need not consider the issue of likelihood of confusion with respect to Opposer's three other pleaded registrations.

Decision: The opposition is sustained on the basis of likelihood of confusion with the mark in Registration No. 1797663.