

This Opinion is not a  
Precedent of the TTAB

Hearing: July 29, 2021

Mailed: August 17, 2021

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**  
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*In re Edward Kwak*  
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Serial No. 88687305  
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Pina M. Campagna and Joshua Zarabi of Carter, DeLuca & Farrell LLP  
for Edward Kwak.

Bradley Goran, Trademark Examining Attorney, Law Office 107,  
J. Leslie Bishop, Managing Attorney.

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Before Cataldo, Shaw, and Lebow,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:


Applicant, Edward Kwak, seeks registration on the Principal Register of the mark  
KINDSKIN (in standard characters), identifying the following services:

Cosmetic skin care services; Health spa services, namely, cosmetic body  
care services; Medical spa services, namely, minimally and non-invasive  
cosmetic and body fitness therapies,

in International Class 44.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88687305 was filed on November 11, 2019, based on Applicant's  
assertion of a bona fide intent to use the mark in commerce under Section 1(b) of the  
Trademark Act. 15 U.S.C. § 1051(b).

The Trademark Examining Attorney has finally refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the registered marks KIND HEALTH GROUP (in standard characters, "HEALTH GROUP" disclaimed) and  ("HEALTH GROUP" disclaimed), both identifying the following services:

Medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies; Wellness, health and nutrition consulting services; Physical therapy; Mental health services

in International Class 44.<sup>2</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney filed briefs, and presented arguments at an oral hearing before this panel.<sup>3</sup> We affirm the refusal to register.

## **I. Exhibits to Applicant's Brief**

Before proceeding to the merits of the refusal, we address an evidentiary matter.

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Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board's TTABVUE docket system.

<sup>2</sup> Registration Nos. 5662375 and 5662376 issued on the Principal Register on January 22, 2019.

Reg. No. 5662376 includes the following description of the mark and color statement: "The mark consists of 'kind' in large blue lettering with the letter 'I' created by four oval shapes of varying shades of blue that increasingly become larger from top to bottom. Underneath in smaller dark blue stylized lettering is 'HEALTH GROUP.'" "The color(s) blue is/are claimed as a feature of the mark."

<sup>3</sup> Applicant did not submit a reply brief.

Applicant attached over 275 pages of exhibits to its appeal brief.<sup>4</sup> Trademark Rule 2.142(d) reads as follows:

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

To the extent that any of the attachments to Applicant's brief were not submitted during prosecution of the involved application, they are not timely.<sup>5</sup> All evidence timely introduced into the record during prosecution will be considered, and the attachments to Applicant's brief will be given no consideration.

## **II. Likelihood of Confusion**

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *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 Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

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<sup>4</sup> 7 TTABVue 25-303. (Applicant's brief.)

<sup>5</sup> The proper procedure for an applicant or examining attorney to introduce evidence after an appeal has been filed is to submit a written request with the Board to suspend the appeal and remand the application for further examination. See Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.02 (Jun. 2021) and authorities cited therein.

We have considered each *DuPont* factor that is relevant, and have treated other factors as neutral. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities between the marks and the relatedness of the goods or services. *See 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.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

For purposes of our determination, we will focus on cited Registration No. 5662375 for the standard character mark KIND HEALTH GROUP. If likelihood of confusion is found as to the mark and services in this registration, it is unnecessary to consider the other cited registration because it identifies identical services. Conversely, if likelihood of confusion is not found as to the mark and services in this registration, we would not find likelihood of confusion as to the mark and services in the other

cited registration. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

**A. The Services, Channels of Trade, and Classes of Customers**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *see also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

It is long settled that likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and registration at issue. *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976); *see also Octocom Systems*, 16 USPQ2d at 1787 (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of [services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s [services], the particular channels of trade or the class of purchasers to which the sales of [services] are directed.”).

In this case, Applicant’s “Medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies” are also identified in the cited registration. Based on the plain wording of the respective identifications, the involved

services are, in part, identical. Furthermore, because they are in-part identical, there is no need for us to further consider the relatedness of Applicant's services with the other services identified in the cited registration.<sup>6</sup> See *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 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 or services in the application).

The third *DuPont* factor concerns “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1161 (quoting *DuPont*, 177 USPQ at 567).

Because the services described in the application and the cited registration are in-part identical, we must presume that the channels of trade and classes of purchasers for those services are the same. See *Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); see also *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the

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<sup>6</sup> Nonetheless, Applicant submitted with its March 18, 2020 Response to first Office Action at 21-108; 109-203, copies of third-party registrations and screenshots from third-party commercial websites showing use of the same marks to identify cosmetic skin care services and medical spa services.

identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade”).

The remaining services, being unrestricted, are presumed to travel through all normal and usual trade channels for such services, and that they are sold to all classes of prospective purchasers for those services. *Stone Lion, Capital v. Lion Capital*, 110 USPQ2d at 1161; *see also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (absent limitation, “goods are presumed to travel in all normal channels ... for the relevant goods.”).

We find that the identity in part of the services, and their presumed overlapping channels of trade and consumers weigh heavily in favor of likelihood of confusion.

**B. Strength of the Cited Mark / Number and Nature of Similar Marks**

Next, we evaluate the strength of the registered mark and the scope of protection to which it is entitled. The fifth *DuPont* factor is the strength of the prior mark, and the sixth factor is the number and nature of similar marks in use for similar goods or services. *DuPont*, 177 USPQ at 567. In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”).

We are not persuaded by Applicant’s argument that:

[T]he commercial impression imparted upon a consumer by Registrant’s word mark “KIND HEALTH GROUP” for Registrant’s services is that

the *practitioners* of the health group are kind. Viewed as a whole, in this context, the term “KIND” is clearly descriptive and weak, far from “extremely strong” as suggested by the Examiner, and therefore entitled to weak or minimal protection.<sup>7</sup>

Turning first to inherent strength, the cited registration issued on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. §1052(f), and we must accord the cited registration the presumption of validity provided for under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). We thus presume that the mark KIND HEALTH GROUP is not merely descriptive, but rather at most suggestive of a quality of services, but nonetheless inherently distinctive with no need to acquire secondary meaning.

We next consider Applicant’s argument concerning the number and nature of third-party registrations of “KIND” formative marks. Applicant argues that “the cited registrations are but one of a plurality of other registered or published/allowed marks using the same term ‘KIND’ with minor distinctions in connection with related services and therefore entitled to a narrower scope of protection.”<sup>8</sup> In support of this contention, Applicant introduced into the record with its March 18, 2020 Response to first Office Action at 204-39, photocopies of the certificates of registration for 24 use-based, third-party registrations that include the word “KIND” or derivations thereof.

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<sup>7</sup> 7 TTABVUE 13-14. (Emphasis supplied by Applicant.)

<sup>8</sup> 7 TTABVUE 17.



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The following examples are illustrative.<sup>9</sup> All marks are in standard characters unless otherwise noted:

Reg. No. 3664980 for the mark KIND identifying “natural soap bars, organic soap bars, liquid soap, bath salts, bubble bath, skin lotions and cleansers for cosmetic use;”

Reg. No. 4636784 for the mark BE BOLD BE KIND identifying “on-line retail store services featuring vegan beauty product and cosmetic accessories;”

Reg. No. 4790221 for the mark KINDERMA identifying a wide variety of soaps, lotions, creams and other skin care preparations;

Reg. No. 5094722 for the mark KINDHEART identifying “medical simulators for simulating surgery procedures;” “rental and leasing of medical simulators for simulating surgery procedures;”

Reg. No. 5088539 for the mark KINDRED GOODS (“GOODS” disclaimed) identifying “fragrances for personal use, perfume oil, body lotion, body scrub, hand lotion, hair mist, non-medicated skin care preparations, namely, body mist;”

Reg. No. 5577982 for the mark KINDRED identifying various oils, butters and moisturizers for cosmetic purposes;

Reg. No. 5418040 for the mark PRACKIND identifying, inter alia, various health and wellness counseling services;

Reg. No. 5824322 for the mark MY KIND identifying “non-medicated herbal body care products, namely, body salves, and body lotions;” and

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<sup>9</sup> Applicant further submitted with its November 5, 2020 Request for Reconsideration at 29-113, copies of registrations retrieved from a private database. However, we do not consider to be probative excerpts from a search report, or any printout from a private computerized database. *See, e.g., In re Classic Beverage Inc.*, 6 USPQ2d 1383 (TTAB 1988).

Reg. No. 5783736 for the mark KINDBODY in stylized form identifying “gynecology services; acupuncture services; advisory services relating to nutrition; counseling and consulting services in the fields of health, nutrition, and lifestyle wellness; medical counseling; counseling and consulting services in the field of women’s health.”<sup>10</sup>

With regard to the third-party registration evidence, 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. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). Nevertheless, in determining the degree of weakness, if any, in the shared term, we must “adequately account for the apparent force of [third-party use] evidence,” regardless of whether “specifics” pertaining to the extent and impact of such use have been proven. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (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 to *Juice Generation*, 115 USPQ2d at 1674.

In this case, all of the third-party registrations consist, inter alia, of “KIND” or a KIND-formative term alone or with a second term that is wholly unlike the following term in either the cited mark (“HEALTH GROUP”) or the involved mark (“SKIN”).

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<sup>10</sup> This registration was originally cited as an additional bar to registration of Applicant’s involved mark, but subsequently was withdrawn by the Examining Attorney.

In addition, none of the third-party registrations recite services closely related to the services in the cited registration and involved application, but rather recite goods and services that more tangentially relate to cosmetics, counseling and medical training. *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants’ marks are weak with respect to the goods identified in their registrations”); accord *Hunt Foods & Indus., Inc. v. Gerson Stewart Corp.*, 367 F.2d 431, 151 USPQ 350, 353 (CCPA 1966).

This evidence falls short of supporting Applicant’s contention that the weakness of “KIND” will cause consumers to distinguish between the marks based upon the “remaining completely dissimilar portions of the marks.”<sup>11</sup> *Cf. In re FabFitFun, Inc.*, 127 USPQ2d at 1675 (evidence of both third-party registration and use established that the shared term in the marks at issue is suggestive of the goods and commercially weak).

There is no evidence regarding the mark’s commercial or marketplace strength. In an ex parte appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). For that reason, “in an ex parte analysis of the *du Pont* factors for

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<sup>11</sup> 7 TTABVUE 19.

determining likelihood of confusion ..., the '[commercial strength] of the mark' ... is normally treated as neutral when no evidence as to [marketplace recognition] ... has been provided." TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1207.01(d)(ix) (Jun. 2021). Because there is no evidence of record regarding the commercial strength of the cited mark, this consideration is neutral.

Based on the totality of the evidence, we find that the shared term "KIND" has not been shown to be particularly weak. We find, as a result, that the mark in the cited registration is entitled to an ordinary scope of protection to be afforded an inherently distinctive mark. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak). Based upon the totality of the record evidence, we find that the registered mark is only somewhat suggestive and inherently distinctive as applied to the identified services.

The fifth and sixth *DuPont* factors are neutral.

### **C. The Marks**

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's KINDSKIN mark and the registered KIND HEALTH GROUP mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks

confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); 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 re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018).

“The 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.” *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721 (internal quotation marks omitted). See also *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988).

Here, upon evaluating the mark KINDSKIN and the registered mark, KIND HEALTH GROUP, we agree with the Examining Attorney that the dominant feature of each mark is the term “KIND.” Because this term appears first in each mark, it is most likely to be impressed in purchasers’ memories. *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). Moreover, for source-identifying purposes, consumers will likely focus on the “KIND” element in the marks in view of the fact that the additional portions thereof, namely

“SKIN” and “HEALTH GROUP” are, at best, highly descriptive of the recited services and the latter, in the cited registration, is disclaimed. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *In re Nat’l Data*, 224 USPQ at 752 (“Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion”); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

As a result, while we agree with Applicant that there are obvious differences between Applicant’s mark and the registered mark resulting from the differences in the terms following “KIND,” viewed as a whole, they are more similar than dissimilar in appearance and sound, particularly as to the initial term.

With regard to meaning, Applicant argues:

Applicant’s mark “KINDSKIN”, as described in more detail below, includes the suffix SKIN which together with the term KIND, at best suggests that the *services* provided are minimally or non-invasive skin or aesthetic *services* or *therapies*. While in contrast, the cited KIND HEALTH GROUP registrations connote the meaning that the *practitioners providing the services* are of a gentle or kind group of practitioners possessing kind characteristics. Accordingly, even a less than reasonably prudent consumer would clearly recognize Applicant’s unique mark KINDSKIN is distinctly different from the cited registrations.<sup>12</sup>

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<sup>12</sup> 7 TTABVUE 11. (Emphasis supplied by Applicant.).

However, it is not clear on this record to what extent, if any, consumers will perceive the meanings Applicant assigns to the marks at issue. Further, there is no evidence that consumers would perceive “KIND” as possessing a different meaning in Applicant’s mark than in the registered mark, particularly in relation to identical “Medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies.” Both marks connote medical spa services that provide kind or gentle cosmetic and body fitness treatments. Even if consumers perceive Applicant’s mark as connoting treatments that are kind to the skin and the cited mark to connote treatments provided by kind professionals, these connotations are nonetheless related.

In sum, we view the marks in their entireties and find them to be more similar than dissimilar in appearance, sound and meaning and, overall, to convey similar commercial impressions such that consumers would view the marks as denoting varying services offered by the same source. The fact that each mark is dominated by the same term “KIND” outweighs the points of dissimilarity. *Nat’l Data*, 224 USPQ at 751.

This is especially the case here because, “[w]hen marks would appear on virtually identical ... services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines.” *See Century 21 Real Estate Corp. v. Century Life of Am.*, 23 USPQ2d 1698, 1799 (Fed. Cir. 1992). *See also ECI Div. of E-Systems, Inc. v. Env’tl. Commc’ns. Inc.*, 207 USPQ 443, 449 (TTAB 1980).

For these reasons, we find that the marks are more similar than dissimilar. The first *DuPont* factor thus also weighs in favor of finding a likelihood of confusion.

#### **D. Conditions of Sale**

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.”

*DuPont*, 177 USPQ at 567.

Applicant argues:

Even if the services fall into the same class, there is no potential for a likelihood of confusion between KINDSKIN and KIND HEALTH GROUP, since the purchases of both Applicant’s and Registrant’s services are expensive and made by sophisticated buyers that exercise a great deal of care in their purchase. In particular, consumers for medical spa services or medically non-invasive services are sophisticated purchasers and likely will do their research or due diligence before spending a lot of money (some services costing thousands) to have services performed on their body. In many cases, it is the insurance which will dictate where the consumer will end up going if such services are covered by their insurance. Therefore, consumers looking for such services will normally look at the list of in network doctors it can see avoiding any potential for likelihood of confusion between KINDSKIN and KIND HEALTH GROUP.

Further, the Registrant’s services marketed under the KIND HEALTH GROUP mark, and the Applicant’s services, are medspa services including aesthetic services such as plastic surgery and are marketed to a distinct class of consumers who are looking to make changes to their outer appearance which tend to be very expensive services. When consumers are searching for these services, such consumers are not making the transaction on an impulse or without any research since these services are generally not inexpensive and the quality of the services and the reviews of the doctor providing the services is also important to the consumer when searching.<sup>13</sup>

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<sup>13</sup> 7 TTABVUE 22-23.



Applicant further argues that taking relevant “case law into consideration, ... those factors are not merely considerations, *they are determinative*.<sup>14</sup>

However, the services identified in the involved application and cited registration are not restricted by trade channel or price point and will be available to all interested purchasers. Evidence submitted by Applicant indicates that related services offered by third parties may cost \$35-\$1,250, with an average cost of \$200-\$300.<sup>15</sup> These services tend to be more expensive than impulse purchases. Nonetheless, there is no indication in the record that the services will only be available to sophisticated and discerning consumers. While some purchasers may be discriminating and exercise care in their selection, others may include ordinary consumers exercising an ordinary degree of care. The standard of care is that of the least sophisticated potential purchaser. *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1163 (*cited in In re FCA US LLC*, 126 USPQ2d at 1222 (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”)).

In the absence of any additional evidence relating to the degree of care purchasers exercise with regard to medical spa services aside from a range of prices for spa services offered by third parties, we are not persuaded that consumer sophistication weighs against a finding of likelihood of confusion.

Moreover, were we to accord a level of sophistication to the purchasers of the services at issue, even sophisticated purchasers are not immune from source

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<sup>14</sup> *Id.* at 22. Emphasis supplied by Applicant.

<sup>15</sup> March 18, 2020 Response to first Office Action at 109-203.

confusion. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers...are not infallible.”)).

The fourth *DuPont* factor is neutral.

### **E. Conclusion**

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant’s arguments relating thereto, including those arguments not specifically addressed herein, we conclude that consumers familiar with Registrant’s medical spa services offered under its mark KIND HEALTH GROUP would be likely to believe, upon encountering Applicant’s KINDSKIN mark, that the in-part identical services originated with or are associated with or sponsored by the same entity.

**Decision:** The refusal to register Applicant’s mark is affirmed under Section 2(d) of the Trademark Act as to Reg. No. 5662375.