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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Quantgene Inc.

Serial No. 88720359

Jeffrey A. Finn of Finn IP Law, P.C.,
for Quantgene Inc.

Douglas M. Lee, Trademark Examining Attorney, Law Office 129,
Pam Willis, Managing Attorney.

Before Bergsman, Coggins, and Lebow,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Quantgene Inc. ("Applicant") seeks registration on the Principal Register of the mark **QUANTGENE** (in standard characters) for, as amended:

> Diagnostic testing services, namely, medical diagnostic testing for cancer and other diseases and disorders; medical testing for diagnostic or treatment purposes; providing cancer screening services, in International Class 44.[1]

[1] Application Serial No. 88720359 was filed on December 9, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the services identified in the application, so resembles the mark **QUANTIGEN** (in standard characters) for "consulting services in the fields of biotechnology, pharmaceutical research and development, clinical laboratory testing, clinical diagnostics, and pharmacogenetics," in International Class 42,[2] on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed and briefed. We affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a proposed mark, for which application has been made, may be refused registration if it "[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods [or services] of the applicant, to cause confusion, or to cause mistake, or to deceive . . . ." 15 U.S.C. § 1052(d).

[2] Registration No. 5383467, issued January 23, 2018.

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as "*DuPont* factors") *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.,* 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.,* 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). "Not all *DuPon*t factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case." *Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, *3 (Fed. Cir. 2020) (internal citation omitted).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities of the services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) ("The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but 'may focus . . . on dispositive factors, such as similarity of the marks and

relatedness of the [services].'") (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Similarity or Dissimilarity of the Services

We begin with the second *DuPont* factor, which "considers '[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration." *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). Therefore, we must make our determination based on the services as they are identified in the application and cited registration. *See Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The services need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). Similarly, the issue is not whether the services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. Becton*, 54 USPQ2d, at 1898 ("[E]ven if the goods [or services] in question are different from, and thus not related to, one another in kind, the same goods [or services] can be related in the mind of the consuming public as to the origin of the goods [or services].") *See also Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d

1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (services need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that the goods [or services] emanate from the same source." (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *5 (TTAB 2020); *L'Oreal v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012).

It is sufficient for a finding of likelihood of confusion as to a particular class if relatedness is established for any item of identified services within that class in the application or cited registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). The application and registration themselves may provide evidence of the relationship between the services. *Hewlett-Packard*, 62 USPQ2d at 1005.

As indicated above, the services in the application, as amended, are "diagnostic testing services, namely, medical diagnostic testing for cancer and other diseases and disorders; medical testing for diagnostic or treatment purposes; providing cancer screening services;" and the services in the cited registration are "consulting services in the fields of biotechnology, pharmaceutical research and development, clinical laboratory testing, clinical diagnostics, and pharmacogenetics."

Applicant argues that it revised and narrowed the identification of services in its application twice; first in the Response to Office Action, and then in the Request for Reconsideration where it "substantially narrowed the identification of services,"

13 TTABVUE 3,[3] to "further distance[]" them from the services in the cited registration.[4] *Id*. at 8. The Examining Attorney, however, argues that "Applicant's [remaining] medical diagnostic testing and medical testing and cancer screening services are closely related to Registrant's consulting services in the fields of biotechnology, pharmaceutical, clinical laboratory testing, clinical diagnostics and pharmacogenetics because they are complementary medical services often rendered by the same sources under the same marks to the same class of consumers," 15 TTABVUE 9, and posits that "Registrant's consulting services in the broadly identified fields of 'clinical laboratory testing' and 'clinical diagnostics' encompass[]

[3] Citations to the briefs in the appeal record refer to the TTABVUE docket system. Citations to the prosecution file refer to the .pdf version of the TSDR system record. *In re Consumer Protection Firm*, 2021 USPQ2d 238, *3 n.3 (TTAB 2021).

[4] We dispatch Applicant's additional argument that the refusal was limited to services Applicant has now deleted because "[t]he Office Actions never even mentioned Applicant's recited medical testing and screening services as being related to Registrant's recited services." 13 TTABVUE 9. This argument is demonstrably false. In the first Office action, the Examining Attorney not only noted that Applicant's identification included the now-remaining services but also emphasized them with bolding: "**diagnostic** services, namely, medical **diagnostic testing** for cancer and other diseases and disorders . . . **medical testing for diagnostic** or treatment purposes; providing cancer screening services." March 13, 2020 Office Action at 3. The Examining Attorney also attached pages from both Registrant's and Applicant's websites to the Office Action and argued that the websites demonstrated that "[A]pplicant and [R]egistrant indeed both offer genetic **diagnostic** services and information related thereto." *Id*. at 4 (emphasis added). Similarly, in the final Office action the Examining Attorney noted and emphasized Applicant's "**Diagnostic testing** services, namely, **medical diagnostic** testing for cancer and other diseases and disorders . . . **medical testing** for **diagnostic** or **treatment** purposes; providing cancer screening services." October 7, 2020 Final Office Action at 3 (emphasis in original). Responding to this argument in the action denying reconsideration, the Examining Attorney clarified the issue for Applicant by stating that "the refusal was never limited to only the now deleted services." April 19, 2021 Reconsideration Letter at 4. We agree, as the record does not demonstrate that the Examining Attorney ever limited the refusal to certain of Applicant's services.

the subject matter of Applicant's services, namely, medical diagnostic testing and medical testing and screening." *Id*.

Where services are broadly identified, they are deemed to encompass all of the services of the nature and type described. *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015). Applicant's broadly identified medical testing services necessarily include genetic testing and testing using genetic information. Indeed, the evidence of record includes an excerpt from Applicant's website indicating that Applicant's testing services use genetic material.[5] *See* March 13, 2020 Office Action at 34-37 ("Deep Genomics Platform," "Unlocking the Deep Human Genome," "Our GRIFFIN Deep Genomics Platform combines deep genomic sequencing and AI to enable accurate profiling of every copy of DNA in blood samples at 100,000X depth."). Similarly, we give Registrant's identification its full sweep, and each field of Registrant's consultation services may include genetics. Indeed, the evidence of record includes an excerpt from Registrant's website indicating that Registrant focuses on "genomic services."[6] *See Id*. at 38-39.

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[5] Applicant's argument that it "distanced its identification of services" from Registrant's services "by removing all references to providing information in the genetic field," 13 TTABVUE 8, fails to appreciate that its remaining identification does not exclude genetic testing or screening or otherwise limit the services to use of non-genetic information or components as part of the testing or screening.

[6] To demonstrate the nature of Registrant's fields of consultation, the Examining Attorney adduced evidence explaining that "biotechnology is a branch of medicine that uses living cells and cell materials" and "some of the most recent uses of biological tech is work in genetic testing;" and that "[p]harmacogenetics . . . is the study of how genes affect the body's response to certain medicines" and "[p]harmacogenetic testing looks at specific genes to help figure out the types of medicine and dosages that may be right for the patient." March 13, 2020 Office Action at 30 (wgu.edu) and 27 (medlineplus.gov).

In support of the argument that the services are related, the Examining Attorney made of record several third-party webpages in an attempt to "establish that companies that offer medical testing and screening services also often offer consulting services directly related to those services." 15 TTABVUE 10. The Examining Attorney points to several specific examples including the following:

> - Cincinnati Children's (cincinnatichildrens.org)[7] offering clinical laboratory services for detection, diagnosis, and treatment of various oncologic, hematologic and immunologic disorders; as well as clinical consultation, test interpretation, and consultation regarding test selection, clinical interpretation, medical management, and follow-up testing.
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> - Genetics Center (geneticscenter.com)[8] offering medical diagnostic testing, cancer screening, comprehensive clinical and laboratory services; as well as a genetic consultation services and teams for both patients and physicians involving geneticists, counselors, laboratory personnel, clinical coordinators, and nurses.
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> - Genome Medical (genomemedical.com)[9] offering diagnostic, proactive, and pharmacogenomics testing for genetic disease, inherited disorders, and medication sensitivity; as well as genetic counseling services and personalized medical recommendations for patients and physicians.
>
> - Greenwood Genetic Center (ggc.org)[10] offering cancer screening, medical diagnostic testing, diagnostic laboratory, and molecular laboratory services to diagnose a wide variety of disorders; as well as clinical referrals, and genetic consultation

[7] April 19, 2021 Reconsideration Letter at 27-32.

[8] *Id*. at 33-40.

[9] *Id*. at 41-54.

[10] *Id*. at 55-68.

with links for both patients and healthcare professionals.

- Mayo Clinic (mayoclinic.org)[11] offering various medical testing including diagnostic genetic testing and pharmacogenetics testing; as well as clinical trials and genetic counseling.

- Penn Medicine (pennmedicine.org)[12] offering cancer screening, laboratory medicine diagnostic tests, full service diagnostics, a complete menu of routine and esoteric tests on blood and other body fluids; as well as consultation for the workup of bleeding disorders, consultation in clinical chemistry, consultative services for infectious diseases, and laboratory consultations.

- Quest Diagnostics (questdiagnostics.com)[13] offering diagnostic tests, and physician and hospital laboratory services; as well as clinical diagnostics consultation.

- Stanford Health Care (med.standford.edu)[14] offering cancer genetics testing, panel genetic testing, diagnostic pathology, clinical trial opportunities; as well as genetic counseling and personalized consultations.

We find that the third-party webpage evidence showing the same mark used for both medical testing and screening services and consulting services directly related to those services is probative to demonstrate that Applicant's services and Registrant's services are related for likelihood of confusion purposes. *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1051 (relatedness supported by evidence that third

[11] *Id.* at 7-21.

[12] *Id.* at 69-77.

[13] *Id.* at 78-87.

[14] *Id.* at 88-104.

parties sell both types of goods under same mark, showing that "consumers are accustomed to seeing a single mark associated with a source that sells both."); *In re Embiid*, 2021 USPQ2d 577, at *22-23 (TTAB 2021) (citing *Ox Paperboard*, 2020 USPQ2d 10878, at *5; and *Hewlett-Packard*, 62 USPQ2d at 1004); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (Internet excerpts from "several third-party car dealerships offering 'tires' for sale on their websites" was "evidence that consumers expect to find both 'tires,' . . . "and 'automobiles' . . . emanating from a common source."); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (accepting website evidence to show relatedness of the goods). The second *DuPont* factor weighs in favor of finding likelihood of confusion.

B. Channels of Trade and Classes of Purchasers

Under the third *DuPont* factor, concerning "[t]he similarity or dissimilarity of established, likely-to-continue trade channels," *Stone Lion*, 110 USPQ2d at 1161 (quoting *DuPont*, 177 USPQ at 567), we must base our determination regarding the similarities or dissimilarities between channels of trade and classes of purchasers for the services as they are identified in the application and the cited registration. *Octocom Sys., v. Hous. Comput. Servs.*, 16 USPQ2d at 1787; *Mini Melts v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1471 (TTAB 2016).

Applicant argues that its services are "directed to *patients*," 13 TTABVUE 9, while Registrant's services are "professional" consulting services "typically for an hourly or flat fee" and "occur at the R&D and business-to-business levels – not at the clinical patient level." *Id.* at 10. The Examining Attorney points out that there are no such

limitations in the respective identifications which "must be interpreted . . . without reading into [them] restrictions or limitations that are not reflected therein," 15 TTABVUE 17, and points to "the evidence of record, as opposed to mere argument, [which] demonstrates that [Registrant's] consultation services . . . [and Applicant's] medical diagnostic testing and screening services are often offered to both patients and healthcare professionals." *Id.* at 19.

Applicant and the Examining Attorney argue over the meaning of "consult." The Examining Attorney points to the definition of record which defines "consult" as a verb meaning, variously, to "seek advice or information of," "refer to, "take into account," "exchange views; confer," "work or serve as a consultant," and as a noun meaning "[a] consultation, especially one involving physicians;"[15] and posits that Registrant's consulting services "refer to providing advice or information to all relevant classes of consumers." 15 TTABVUE 18. On the other hand, Applicant argues that "'[c]onsulting services' is a phrase well understood to be offered by dedicated professional 'consultants', with expertise in a particular field; the phrase implies that a business exists to provide specialized expertise and advice (typically for an hourly or flat fee) to others," 13 TTABVUE 10, and posits that "consumers would decidedly not refer to" the counseling services offered by the third-party clinical providers and treatment and cancer screening centers of record "as 'consulting services.'" *Id.* at 11.

[15] THE AMERICAN HERITAGE DICTIONARY (ahdictionary.com), March 13, 2020 Office Action at 8.

We agree that the identifications of services in the application and cited registration have no limitations as to trade channels or classes of customers, and we may not read any limitation into them. *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *47 (TTAB 2020) (citing *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)). *See also In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1091 (TTAB 2016); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Therefore, we must presume that the services travel in all channels of trade appropriate for such services and are available to all usual consumers. *See Hewlett-Packard*, 62 USPQ2d at 1005.

The majority of evidence relating to the trade channels through which the services at issue travel and to whom they are directed comes from the third-party websites submitted by the Examining Attorney, discussed above. The evidence shows that the services identified in the application and cited registration are offered to both patients and physicians. See, for example, the Cincinnati Children's webpage and its tabs for "Patients and Family" as well as "Healthcare Professionals" and "Researchers;"[16] the Mayo Clinic webpage and its information for both patients and medical professionals;[17] and the Greenwood Genetic Center webpage with tabs both "For Patients" and "For Healthcare Professionals."[18] Additional evidence adduced by the Examining Attorney reveals that "[t]wo classes of genetic testing are now

[16] April 19, 2021 Reconsideration Letter at 27.

[17] *Id*. at 7.

[18] *Id*. at 55.

available: clinical or direct-to-consumer (DTC). A clinical genetic test is usually done in a clinical environment with access to trained medical professionals, such as genetic counselors, to help patients interpret the results, which can be very easy to misinterpret. . . . By contrast, DTC genetic testing is done at home after ordering a simple test kit online."[19]

Contravening Applicant's argument that Registrant's services would not occur "at the clinical patient level," 13 TTABVUE 10, is an excerpt from Registrant's website revealing a "physician portal" tab.[20] Similarly, there is nothing on Applicant's own website to indicate that its services are directed to patients.[21] We find that the evidence demonstrates that both Applicant's and Registrant's services, as broadly recited, are offered to patients seeking genetic testing, and are offered through clinical providers and treatment and cancer screening centers; that is, to overlapping consumers in overlapping channels of trade. As such, the third *DuPont* factor also favors a finding of likelihood of confusion.

C. Consumer Sophistication

"The fourth *DuPont* factor considers '[t]he conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.'" *Stone Lion*, 110 USPQ2d at 1162, quoting *DuPont*, 177 USPQ at 567. Applicant argues, without citing any evidence in the record, that "confusion [is] unlikely for the added

[19] "What is genomic medicine?" (ncbi.nlm.nih.gov), March 13, 2020 Office Action at 14-15.

[20] March 13, 2020 Office Action at 38.

[21] *See* March 13, 2020 Office Action at 34-37; April 7, 2021 Request for Reconsideration at 30 & 34-35

reason of the high levels of thought and care that consumers put in before purchasing medical and healthcare tests and screening (from Applicant) and biotech, pharma and medical lab consulting services from Registrant." 13 TTABVUE 13.

Applicant likens this case to *Carefirst of Md., Inc. v. FirstHealth of the Carolinas, Inc.*, 77 USPQ2d 1492 (TTAB 2005), where the Board stated that "[s]imply put, in purchasing healthcare services, even ordinary consumers are likely to exercise greater care and will know with whom they are dealing." *Id*. at 1504. However, that concluding statement was premised on health insurance services and health maintenance organizations not at issue in this appeal. Specifically, the Board in *Carefirst* determined that consumers of healthcare insurance and related services such as HMO services will proceed cautiously and deliberately in making their choice for health coverage. *Id*. at 1503-04.[22]

Unlike in *Carefirst*, this appeal does not involve overarching, gate-keeping health maintenance organization membership. Applicant's identified services are, simply, "medical diagnostic testing for cancer and other diseases and disorders; medical testing for diagnostic or treatment purposes; providing cancer screening services." And, importantly, Applicant submitted no evidence of the cost of these services or

[22] Leading up to what Applicant would have us take as a sweeping generalization applicable to even routine health-related services (e.g., blood tests) was an analysis based on the important role health insurance plays in American lives. Before reaching the conclusion in *Carefirst*, the Board explained that "the decision to purchase healthcare insurance and related services, such as HMO services, is a very important decision for a person or a family to make. This decision will have far reaching effects bearing on the quality of available healthcare services. Moreover, it is common knowledge that the purchase of healthcare services involves a substantial financial commitment; healthcare costs continue to increase year after year." *Id*. at 1503-04.

how consumers make purchasing decisions for them. Further, even if we accept that purchasers of medical testing for diagnostic or treatment purposes might exercise an elevated degree of care in purchasing such services, we are not persuaded that the degree of care will avoid a likelihood of confusion, since the fact that "the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar [services]. Human memories even of discriminating purchasers are not infallible." *In re Rsch. and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (internal quotation omitted).

Because Applicant does not point to any evidence in the record to demonstrate that consumers in the general public of the consulting and medical diagnostic testing services offered by Registrant and Applicant are sophisticated or would exercise a heightened degree of care, and the standard of care is that of the least sophisticated potential purchaser, *Stone Lion*, 110 USPQ2d at 1163, we find the fourth *DuPont* factor to be neutral.

D. Strength of the Cited Mark

We next turn to the arguments directed to the fifth and sixth *DuPont* factors, which consider the strength of the cited registered mark, and the extent to which that strength may be attenuated by "[t]he number and nature of similar marks in use on similar" services. *DuPont*, 177 USPQ at 567.

The Examining Attorney argues that there is no "evidence that 'QUANTGENE' and 'QUANTIGEN' have any meaning. Rather, both appear to be coined terms. Thus,

it must be concluded that Registrant's mark 'QUANTIGEN' is an arbitrary and strong mark, and hence entitled to a wider scope of protection than less distinctive, weaker, suggestive or descriptive marks." 15 TTABVUE 7. Applicant argues that "QUANT is a common word and is used by many companies as a first portion of a mark used in connection [with] goods and services in many fields of use, including the medical and consulting fields" and it is "the first portion of many third-party marks that are registered. Therefore, the public can be expected to look to other elements of the comparted [sic] marks to distinguish the sources of the respective services." 13 TTABVUE 4 n.2.

There are multiple flaws in Applicant's argument, the primary of which is that there is no evidence in the record to support any part of it. Because it is well settled that "[a]ttorney argument is no substitute for evidence," *Cai v. Diamond Hong*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)), we need not consider Applicant's argument further. *Cf. Jack Wolfskin Ausrustung Fur Draussen GmbH* v. *New Millennium Sports, S.L.U.*, 707 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) ("voluminous" and "extensive" **evidence** of relevant third-party uses and registrations were made of record by the applicant) (emphasis added). Moreover, because the cited mark is registered on the Principal Register without a claim to acquired distinctiveness, it is presumptively valid and distinctive for the identified services. Trademark Act Sections 7(b) and 33(a), 15 U.S.C. §§ 1057(b) and 1115(a); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007). Accordingly, Registrant's

mark is entitled to no less than the normal scope of protection accorded to any inherently distinctive mark.

E. Similarity or Dissimilarity of the Marks

Turning to the first *DuPont* factor, we consider the "similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression." *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *Inn at St. John's*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). 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).

The emphasis of our analysis must be on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014). Since the relevant services include "medical testing for diagnostic or treatment purposes" and "consulting services in the fields of . . . clinical laboratory testing, clinical diagnostics," without any restrictions or limitations, the average purchaser is an ordinary consumer of such services. Because this includes anyone seeking a medical diagnostic test, including genetic testing, for any disease or any disorder, this contemplates almost everyone.

The proper test regarding similarity "is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their

commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (quoting *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721 (internal quotation marks and citation omitted)). We keep in mind that "[s]imilarity is not a binary factor but is a matter of degree." *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

The Examining Attorney argues that the marks "are similar in sound, appearance, and overall commercial impression," 15 TTABVUE 7, because "each mark consists of a nine letter word which begins with the same five letters, namely, the term 'QUANT,' followed by a four letter term containing the letters 'GEN' in that order" and "[t]he sole difference between the two marks is a single vowel which is combined with the term 'GEN'." *Id.* at 6. Applicant acknowledges that "the first five (5) letters of both marks are the same –QUANT," but emphasizes that "the remainder of each [mark is] decidedly different from each other: GENE . . . versus IGEN" which difference, it argues, is "meaningful," 13 TTABVUE 4-5, as it causes the "marks [to] have very different cadences and sound." *Id.* at 7. Specifically, Applicant argues that "taking an objectively reasonable pronunciation approach" reveals that the "natural and expected pronunciation" of Registrant's mark would be "the three-syllabic term QUAN TI GEN ('kwan-te-jen')," while Applicant's mark would be pronounced as "a two-syllable term, as in 'kwant-jean'." *Id.* at 6-7.

Unsurprisingly, Applicant focuses on the differences in appearance and sound while the Examining Attorney focuses on the similarities. Nonetheless, it is undisputed that each mark begins with the same lettering Q-U-A-N-T, and that each mark contains the trailing lettering G-E-N. The difference in spelling, as the Examining Attorney notes, relates to the use and placement of a different vowel: Registrant's mark QUANTIGEN includes an "I" and places that vowel before the G-E-N portion; while Applicant's mark QUANTGENE includes an "E" and places that vowel after the G-E-N portion. The marks are highly similar in appearance to the extent each begins with Q-U-A-N-T and contains G-E-N, but are nonetheless slightly dissimilar due to the placement of a different vowel.

The marks are also similar in sound to the extent each begins with Q-U-A-N-T. Neither QUANTIGEN nor QUANTGENE is a recognized word, and it is well settled that "[t]here is no correct pronunciation of a trademark that is not a recognized word," *StonCor Group, Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (citing *In re Belgrade Shoe Co.*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969)). While we agree with Applicant that QUANTIGEN reasonably may be pronounced as /kwan-tə-jen/, it is equally possible and reasonable that QUANTIGEN may be pronounced as /kwant-ə-jen/, /kwant-ə-jun/, /kwant-i-jen/, /kwant-i-jun/, /kwan-tə-jun/, /kwan-ti-jen/, and /kwan-ti-jun/, based on standard English pronunciation.[23]

[23] In an attempt to rebut the Examining Attorney's argument of how QUANTIGEN "could be pronounced," Applicant inserted within its brief a hyperlink to an audio clip of an interview with Registrant's CEO and founder to demonstrate how he says the mark in conversation. 13 TTABVUE 6 n.3. The evidence is both untimely and not properly made of record. The record in an application should be complete prior to filing the ex parte appeal, Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), and web addresses or hyperlinks are insufficient to make the

These are all quite similar, with slight variations. As suggested by Applicant, QUANTGENE may be pronounced as /kwant-jeen/. *See Inter IKEA Sys. v. Akea*, 110 USPQ2d at 1740 n.19 (considering "all the reasonable possibilities" for the marks' pronunciations) (citing *Centraz Indus., Inc. v. Spartan Chem. Co.*, 77 USPQ2d 1698, 1701 (TTAB 2006); *Edison Bros. Stores, Inc. v. Brutting E.B. Sport-Int'l GmbH*, 230 USPQ 530, 533 (TTAB 1986)). The /kwant-jeen/ pronunciation is different in sound, but not a world apart, from /kwan-tə-jen/ or any of the other reasonable pronunciations. We find that the marks have similar, albeit not identical, pronunciations.

On the one hand Applicant argues, without citing to any evidence, that the /kwant-jeen/ pronunciation it suggests for its own mark is "the clearly natural and expected pronunciation," while on the other hand Applicant decries the Examining Attorney's earlier arguments that the same mark may be pronounced as "QUAN T GENE"[24] as being made without "cite[] to [any] evidence." 13 TTABVUE 6. However, Applicant seeks registration of its mark in standard characters, which is not limited to a particular font style, size, or color, Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a), and could, if registered, therefore use a style, size, or color to emphasize the "T" in its

underlying webpages of record. *ADCO*, 2020 USPQ2d 53786, at *2; *see also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 n.21 (TTAB 2018) (Board does not consider websites for which only links are provided). At any rate, as noted above QUANTIGEN is not a dictionary term with a known pronunciation. We will not belabor the point except to note that "there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner." *In re St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012)).

[24] *See* March 13, 2020 Office Action at 3; October 7, 2020 Final Office Action at 2; April 19, 2021 Reconsideration Letter at 4.

mark, making it likely that the "T" would be perceived and pronounced separately. Moreover, because both Applicant's and Registrant's marks appear in standard characters we must consider all possible presentations of those marks, including their presentation in the same stylization. *See Viterra*, 101 USPQ2d at 1910; *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) (analysis of standard character marks not limited to "reasonable manners" of depiction). It is equally possible that both marks will be presented in all capital letters and in the same color. Indeed, the record demonstrates that is at least one way in which each mark is currently being used: Registrant's mark has been depicted in white, all capital, sans serif letters as 

and Applicant's mark has also depicted in white, all capital, san serif letters as 

.[25] *See Viterra Inc.*, 101 USPQ2d at 1910 (quoting *Citigroup v. Capital City Bank Grp.,* 98 USPQ2d at 1259 ("[I]llustrations of the mark as actually used may assist the [Board] in visualizing other forms in which the mark might appear.")).

We acknowledge that there are minor differences in appearance and sound when the marks are viewed or verbalized next to each other and analyzed under a microscope, but, of course, "[t]he proper test is not a side-by-side comparison of the marks." *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (quoting *Coach Servs. v.*

[25] *See* March 13, 2020 Office Action at 38 (quantigen.com) and 37 (quantgene.com). To be clear, we consider here only the similar font style and color of the word marks; the design elements accompanying the marks as actually used are not part the marks as registered or proposed.

Triumph Learning, 101 USPQ2d at 1721). The slight differences between the marks are not enough to distinguish them and create dissimilar marks. *See Glenwood Labs., Inc. v. Am. Home Prods. Corp.,* 455 F.2d 1384, 173 USPQ 19 (CCPA 1972) (MYOCHOLINE for a medicinal preparation for treatment of dysphagia, abdominal distention, gastric retention, and urinary retention is similar to MYSOLINE for an anti-convulsant drug); *Alfacell v. Anticancer Inc.,* 71 USPQ2d 1301, 1305 (TTAB 2004) (ONCASE v. ONCONASE: "As seen and spoken, this middle portion may be missed by many of the relevant purchasers."); *In re Total Quality Grp. Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999) ("Applicant's mark STRATEGYN and registrant's mark STRATEGEN are phonetic equivalents and differ by only one letter."); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("[A]lthough there are certain differences between the [marks' CAYNA and CANA] appearance, namely, the inclusion of the letter 'Y' and the design feature in applicant's mark, there are also obvious similarities between them. Considering the similarities between the marks in sound and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions.").

We find the marks more similar than dissimilar in appearance and sound, and the first *DuPont* factor weighs in favor of finding likelihood of confusion.

F. Absence of Evidence of Actual Confusion

The seventh *DuPont* factor considers the "nature and extent of any actual confusion," *DuPont*, 177 USPQ at 567, and the eighth *DuPont* factor considers "the length of time during and conditions under which there has been concurrent use without evidence of actual confusion." *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020) (quoting *DuPont*, 177 USPQ at 567). Generally, the absence of any reported instances of confusion is meaningful only if the applicant provides contextual evidence that allows the Board to meaningfully assess the length of time and degree to which the applicant's and registrant's commercial activities would have provided an opportunity for confusion to have manifested itself if it were likely. *In re Embiid*, 2021 USPQ2d 577, at *39 (citing *Guild Mortg.*, 2020 USPQ2d 10279, at *8); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *9 (TTAB 2019).

Applicant argues that "since at least as far back as 2015, [it is] not aware of a single instance of actual confusion between the marks," 13 TTABVUE 13, and cites to the declaration of Johannes Bhakdi, its founder and CEO, who testified that Applicant has "operated under the QUANTGENE name" since 2015, "operated and maintained a publicly accessible website" since 2015, "launched its first clinical feasibility trial for" a "platform" to profile DNA fragments in 2016, "announced a breakthrough in early cancer detection" in 2016, and has "receive[d] significant press coverage regarding its products and services, and the development thereof, in connection with the QUANTGENE name and mark."[26] The exhibits attached to the

[26] Bhakdi Decl. ¶¶ 3-7 (April 7, 2021 Request for Reconsideration at 21-22).

Bhakdi declaration include one press release and a screen shot from quantgene.com showing the "Newsroom" tab of Applicant's website which contains what appear to be links to various media in which Applicant is likely mentioned.[27] Applicant describes the Newsroom page as a "compil[ation of] various news articles regarding the company to date."[28] There is no evidence as to the amount and extent of Applicant's or Registrant's sales of their identified services under their involved marks, nor evidence of their geographical overlap.

While Applicant provided some minimal facts related to the use of its own mark, it did not provide any evidence as to Registrant's commercial activities. Applicant previously argued that "[a]ccording to USPTO records, [Registrant] claims to have been using the [c]ited [m]ark . . . since October 12, 2015." April 7, 2021 Request for Reconsideration at 19. However, with regard to the cited mark, the allegation in a registration of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence. *See* Trademark Rule 2.122(b)(2); 37 C.F.R. § 2.122(b)(2).

Applicant's argument that it is "not aware of a single instance of actual confusion between the marks," 13 TTABVUE 13, is entitled to little weight. *Majestic Distilling*, 65 USPQ2d at 1205 ("[U]ncorroborated statements of no known instances of actual confusion are of little evidentiary value." (citing *In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of

[27] Bhakdi Decl., Exs. D and E (*Id.* at 31-35).

[28] Bhakdi Decl. ¶ 7 (*Id.* at 22).

appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion)). As the Board observed in *In re Opus One, Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001), and explained in *Guild Mortg.*, 2020 USPQ2d 10279, at *7-8, in an ex parte context, there is no opportunity to hear from the registrant about whether it is aware of any reported instances of confusion, thus limiting the potential probative value of evidence bearing on the eighth *DuPont* factor, compared with an inter partes proceeding where the registrant has an opportunity to present argument and evidence on the matter. We find the seventh and eighth *DuPont* factors to be neutral.

G. Summary and Conclusion

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. We have found that the QUANTGENE and QUANTIGEN marks are more similar than dissimilar in appearance and sound, Registrant's mark is entitled to no less than the normal scope of protection accorded to any inherently distinctive mark, Applicant's and Registrant's services are related and sold in overlapping channels of trade to overlapping consumers who have not been shown to be sophisticated, and there is a lack of meaningful evidence as to actual confusion and concurrent use of the marks. On balance, we find these factors render confusion likely.

II. Decision

The refusal to register Applicant's mark QUANTGENE is affirmed.