

This Opinion is Not a
Precedent of the TTAB

Mailed: April 22, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Spectrum Image, Inc.

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Serial No. 88733158

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Daniel J. Simon of Lalchandi Simon PL, for Spectrum Image, Inc.

Laura E. Fionda, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

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Before Pologeorgis, Larkin, and Johnson,
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Spectrum Image, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark IBODY AESTHETICS¹ (“Applicant’s Mark”) for services ultimately identified as “Cosmetic and plastic surgery; Plastic surgery,” in International Class 44 (“Applicant’s Services”).

¹ Application Serial No. 88733158, filed on December 19, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intent to use the mark in commerce. Applicant disclaims the exclusive right to use the word “AESTHETICS.”

The Trademark Examining Attorney refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's Mark, as used in connection with Applicant's Services, so resembles the composite mark shown below ("Registrant's Mark"),



registered on the Principal Register in International Class 44 for

Alternative medicine services, namely, detoxification services; Conducting medical physical evaluations; Consulting services in the fields of diagnostic medical testing and nutrition; Health spa services, namely, providing weight loss programs; Providing information in the field of surgical weight loss; Consulting services in the field of hormone replacement therapy; Isolation, collection, and banking of umbilical cord tissue perivascular stem cells; Medical clinic providing weight loss solutions, services and programs, nutrition counseling, hormone

² Registration No. 5544745, issued August 21, 2018. The mark is described as follows: "The mark consists of a butterfly design on top with a line drawn below the butterfly and the word 'THE' placed in the center of the line and the word 'i BODY' placed below the line." Color is not claimed as a feature of the mark.

The mark is also registered for various goods in International Class 5, but this refusal is limited to the services in International Class 44.

Citations to the appeal record are from the publicly available documents in TTABVUE, the Board's electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry, if applicable.

Citations to the application record are to downloadable .pdf versions of the documents in the Trademark Status and Document Retrieval (TSDR) database of the United States Patent and Trademark Office (USPTO).

therapy, including, bioidentical hormone replacement, anti aging therapy, and natural hormone therapy, medical aesthetic procedures, including, laser hair removal, laser peels, botulinum toxin treatments, microdermabrasion, liposuction, vein treatments, vein therapy, cellulite treatments, body contouring treatments, injectable filler treatments, facials, and skin care

(“Registrant’s Services”), as to be likely to cause confusion, to cause mistake, or to deceive.

The application was abandoned for failure to timely respond to an office action. Shortly thereafter, Applicant filed a Petition to Revive the abandoned application together with a response to the Final Office Action and a concurrent appeal to the Board. Applicant’s petition was granted, and the response was treated as a Request for Reconsideration of the Final Office Action. The Request for Reconsideration was denied.

The appeal has been fully briefed. We affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark must 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).

To determine whether there is a likelihood of confusion between the marks under Section 2(d), we analyze the evidence and arguments under the *DuPont* factors.

In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). “Not all *DuPont* 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). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, *29 (TTAB 2021) (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)).

A. The Similarity or Dissimilarity and Nature of the Services

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.” *DuPont*, 177 USPQ at 567. When analyzing the second *DuPont* factor, we look to the identifications of services in the application and cited registration. *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); see *Octocom Sys., Inc. v. Hous. Comput. Servs. 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 [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 sales of the [services] are directed."). The services do not have to be identical or even competitive in order to find that there is a likelihood of confusion. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1368 (TTAB 2009).

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*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("[E]ven if the [services] in question are different from, and thus not related to, one another in kind, the same [services] can be related in the mind of the consuming public as to the origin of the [services]. It is this sense of relatedness that matters in the likelihood of confusion analysis."). It is sufficient that the services of the applicant and the registrant are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (citation omitted); *On-Line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000).

Evidence of relatedness may include pages from third-party websites showing that the relevant services are used by purchasers for the same purpose, advertisements

showing that the relevant services are advertised together, or copies of use-based registrations of the same mark for both Applicant's identified services and the services listed in the cited registrations. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes because consumers were likely to purchase the products at the same time and in the same stores).


The Examining Attorney argues that the cosmetic and plastic surgery services offered under Applicant's Mark and the myriad services offered under Registrant's Mark, which include medical aesthetic procedures, are related. To demonstrate that Applicant's and Registrant's services can emanate from a single source under a single mark, the Examining Attorney made of record the following third-party registrations:³

³ Nov. 3, 2020 Final Office Action at 96-107, 114-37. Two of the registrations cited by the Examining Attorney, No. 3999262 for MAKE YOU PERFECT, and No. 3893883 for AESTHETIC EDGE, are canceled.

<u>Reg. No.</u>	<u>Reg. Mark</u>	<u>Relevant Services</u>
2475344	WHERE BEAUTY MEETS MEDICINE	<p>Skin care referral services and appointment scheduling with affiliated physicians performing medical treatments involving the skin, in International Class 35.</p> <p>Cosmetic skin care services, namely, providing medical services through affiliated physicians who provide plastic surgery, cosmetic surgery, dermatological and medical treatments for the skin, collagen and botulinum toxin injections, laser skin therapy, laser hair removal, laser skin peels and tattoo removal, in International Class 42.</p>
3622233	SONO BELLO	<p>Cosmetic and plastic surgery, namely, liposuction, laser body sculpting and removal of fat cells, surgical procedures that tighten loose skin, surgical procedures that reduce cellulite and diminish stretch marks, and surgical procedures involving cellulose reduction using infrared-light heat procedures, in International Class 44.</p>
3760810	IDEAL NOSE	<p>Conducting medical physical evaluations; Cosmetic and plastic surgery; Cosmetic and plastic surgery, namely, a minimally invasive face/neck lift done under local and/or general anesthesia; Cosmetic electrolysis; Cosmetic services, namely, non-permanent hair removal; Counseling services in the fields of health, nutrition and lifestyle wellness; Facial treatment services, namely, cosmetic peels; Laser and intense pulse light skin enhancement procedures; Laser hair removal services; Laser tattoo removal service; Liposuction and surgical body shaping services; Medical consultations; Medical counseling; Medical information; Medical services, namely, cosmetic and reconstructive surgery; Medical, hygienic and beauty care; Microdermabrasion, namely, a topical skin treatment involving abrasion of the skin with a high-pressure flow of crystals; Non-</p>

		<p>invasive cosmetic medical procedures; Nutrition counseling; Permanent hair removal and reduction services; Provide a website featuring information about holistic cosmetic and plastic surgery practice; Skin treatments, namely, the injection of dermal filling agents and neuromuscular blocking agents to reduce the appearance of facial lines and wrinkles, in International Class 44.</p>
<p>3964805</p>	<p>PELVIC SURGERY & INTIMATE AESTHETICS</p>	<p>Gynecology services; cosmetic gynecology services, vaginal rejuvenation, vaginal tightening, vaginoplasty, perineoplasty, labiaplasty, labia reduction of labia majora and minora; labia majora augmentation, pubic mons and labia majora liposuction, clitoral hood reduction, hymenoplasty, anal skin tag excision, anal bleaching, G-spot enlargement, urogynecology services, vaginal reconstruction, bladder suspension, incontinence surgery, cystocele and rectocele repair; cosmetic and plastic surgery; cosmetic skin care services; cosmetic body care services in the nature of body sculpting and laser skin tightening; non-invasive cosmetic medical procedures; medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies; liposuction and surgical body shaping services; labia majora augmentation via fat transfer; fat reduction from thighs, buttock, back, abdomen, chest, arms via surgery, minimally non-invasive surgery and liposuction; laser cellulite reduction service; performing cosmetic surgical procedures for vaginal rejuvenation; facial treatment services, namely, cosmetic peels; hormone replacement therapy services; medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies, in International Class 44.</p>

4645391	MEDIFACE SPA	Cosmetic and plastic surgery, namely, blepharoplasty and minimally invasive face, neck and lid lifts done under local anesthesia; medical spa services, namely, minimally and non-invasive cosmetic body fitness therapies; and laser skin enhancement procedures, in International Class 44.
4339643	CLEAR CLINIC	Medical services; Dermatology services; Medical, hygienic, and beauty care for people; Beauty spa services, namely, cosmetic body care; Consulting services in the field of health and medical care; Cosmetic body care services; Cosmetic skin care services; Hair replacement, hair addition, and hair implant services; Medical assistance consultancy provided by doctors and other specialized medical personnel; Medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies; Plastic surgery services; Providing a Web site featuring medical information; Providing medical treatments using laser technology; Providing news and information in the field of medicine; Skin treatments, namely, the injection of dermal filling agents and neuromuscular blocking agents to reduce the appearance of facial lines and wrinkles; Stretch mark treatment services; Cosmetic laser surgery, including laser hair removal, laser and light acne treatments, laser resurfacing, in International Class 44.
4773331	TRUSTED WITH FACES WORLDWIDE	Cosmetic and plastic surgery; Cosmetic surgery services; Plastic surgery services; Rhinoplasty; Ethnic rhinoplasty; Revision rhinoplasty; Blepharoplasty; Facial scar revision; Hair replacement; Necklift; Endoscopic browlift; Fat transfer; Facial dermal filler injections; Micro needling; Otoplasty; Mentoplasty; Facial implants; Rhytidectomy; Facial reconstructive procedures; Skin resurfacing; Providing information in the field of cosmetic and

		plastic surgery via social networks; providing a website featuring information in the field of cosmetic and plastic surgery, in International Class 44.
4869442		Plastic surgery services; cosmetic surgery services; providing medical aesthetic treatments services, namely, laser peels, botulinum toxin treatments, microdermabrasion, liposuction, vein treatments, vein therapy, cellulite treatments, body contouring treatments, injectable filler treatments, facials, and skin care laser treatments; cosmetic skin care services; and weight loss services, namely, liposuction, in International Class 44.
4958471	WEISS	Cosmetic and plastic surgery; Cosmetic skin care services; Cosmetic surgery services; Laser vision correction services; Laser vision surgery services; Skin treatment, namely, the injection of dermal fillers to reduce the appearance of facial fine lines, in International Class 44.
5029709	WELLMEDICA	Beauty spa services, namely, cosmetic body care; Consulting in the field of health and wellness to bring about personal happiness; cosmetic analysis services for determining the most appropriate cosmetics to be used with a person's face shape and skin tone; Cosmetic and plastic surgery; Cosmetic and plastic surgery, namely, a minimally invasive face/neck lift done under local anesthesia; Cosmetic skin care services; Counseling services in the fields of health, herbalism, and lifestyle wellness; Counseling services in the fields of health, nutrition and lifestyle wellness; Facial treatment services, namely, cosmetic peels; Health care services, namely, wellness programs; Health spa services for health and wellness of the body and spirit; Health spa services for health and wellness of the body and spirit, namely, providing massage, facial and body treatment

		<p>services, cosmetic body care services; Health spa services, namely, cosmetic body care services; Medical clinic providing weight loss solutions, services and programs, nutrition counseling, hormone therapy, including, bioidentical hormone replacement, anti aging therapy, and natural hormone therapy, medical aesthetic procedures, including, laser hair removal, laser peels, botulinum toxin treatments, microdermabrasion, liposuction, vein treatments, vein therapy, cellulite treatments, body contouring treatments, injectable filler treatments, facials, and skin care; Medical spa services, namely, minimally and non-invasive cosmetic and body fitness therapies; Non-invasive cosmetic medical procedures; provide website content featuring information about holistic cosmetic and plastic surgery practice; Providing assistance, fitness evaluation and consultation to individuals to help them make health, wellness and nutritional changes in their daily living to improve health; Wellness and health-related consulting services, in International Class 44.</p>
5167114	BODYBANKING	<p>Medical services; Medical services in the field of cosmetic and plastic surgery; Non-invasive cosmetic medical procedures; Cosmetic and plastic surgery; Cosmetic and plastic surgery, namely, a minimally invasive face/neck lift done under local anesthesia; Cosmetic surgery services; Cosmetic skin care services; Liposuction and surgical body shaping services; Laser and intense pulse light skin enhancement procedures; Laser skin rejuvenation services; Laser skin tightening services; Provide a website featuring information about holistic cosmetic and plastic surgery practice; Providing medical information, consultancy and advisory services, in International Class 44.</p>

5999410	AESTHETICA MEDICAL SPA	Cosmetic surgery services; Cosmetic and plastic surgery; Cosmetic and plastic surgery, namely, a minimally invasive face/neck lift done under local anesthesia; Laser and intense pulse light skin enhancement procedures; Laser hair removal services; Laser skin rejuvenation services; Laser skin tightening services; Laser tattoo removal service; Liposuction and surgical body shaping services; Plastic surgery; Plastic surgery services; Cosmetic laser treatment of wrinkles, textural irregularities, red and brown spots; Cosmetic skin care services; Dermatologic laser removal of body hair, tattoos; Health spa services, namely, laser treatments for acne, rejuvenation, scars, tattoo removal and for facials and massage; Medical skin care services; Medical clinic providing weight loss solutions, services and programs, nutrition counseling, hormone therapy, including, bioidentical hormone replacement, anti aging therapy, and natural hormone therapy, medical aesthetic procedures, including, laser hair removal, laser peels, botulinum toxin treatments, microdermabrasion, liposuction, vein treatments, vein therapy, cellulite treatments, body contouring treatments, injectable filler treatments, facials, and skin care; Skin treatment, namely, the injection of dermal fillers to reduce the appearance of facial fine lines, in International Class 44.
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The Examining Attorney also made of record pages from the following third-party websites listed below, showing that the following entities offer various services, including cosmetic surgery, plastic surgery, laser hair removal, laser peels, botulinum toxin treatments, microdermabrasion, liposuction, vein treatments, vein therapy,

cellulite treatments, body contouring treatments, injectable filler treatments, facials, and skin care, under the same mark:

- davinciplastic.com, DA Vinci Plastic Surgery, Washington, DC;⁴
- westendplasticsurgery.com, West End Plastic Surgery, Washington, DC;⁵
- advancedplasticsurgerycenter.com, Advanced Plastic Surgery Center, Arlington, Virginia;⁶
- drbucky.com, Office of Dr. Louis P. Bucky, MD, FACS, Philadelphia, Pennsylvania;⁷
- drvitenas.com, Vitenas Cosmetic Surgery, Houston, Texas;⁸
- cosmeticsurgeryhouston.com, Eisemann Plastic Surgery Center, Houston, Texas;⁹
- ibodyaesthetics.com, iBody Aesthetics, Miami, Florida;¹⁰
- poppcosmeticsurgery.com, Popp Cosmetic Surgery, PC, Omaha, Nebraska;¹¹ and

⁴ Nov. 3, 2020 Final Office Action at 8-34.

⁵ *Id.* at 35-63.

⁶ *Id.* at 64-71.

⁷ *Id.* at 72-95.

⁸ Oct. 5, 2021 Denial of Request for Reconsideration at 4-32.

⁹ *Id.* at 33-45.

¹⁰ *Id.* at 46-52.

¹¹ *Id.* at 53-58.

- spectrum-aesthetics.com, Spectrum Aesthetics Center for Cosmetic Surgery, Miami, Florida.¹²

Although the third-party registrations are not evidence that the registered marks are actually in use or that the public is familiar with them, particularly in the absence of any evidence showing the extent of their use, we weigh whatever probative value they have in conjunction with the third-party website evidence submitted by the Examining Attorney. *See Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (citation omitted); *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 462-63 (CCPA 1973); *In re Midwest Gaming & Entm't*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1207.01(d)(iii) (July 2021).

Applicant contends that the services are not related since the services offered under Registrant's Mark are, by their nature, "less invasive and stop short of the plastic surgery offered by 'iBody Aesthetics.'" (Applicant's Brief, 11 TTABVUE 9-10). Applicant further contends that "[t]he geographic location is an especially important factor to consider in determining whether there is a likelihood of confusion between these two marks because **most of the services** offered by Registrant and **all of the services** offered by Applicant would have to happen in person."¹³ (11 TTABVUE 10;

¹² *Id.* at 59-68.

¹³ In support of its argument, Applicant cites an unpublished federal court opinion from the Western District of Kentucky, *Trilogy Healthcare of Louisville E., LLC v. Camelot Leasing, LLC*, 3:18-CV-00307-RGJ, 2019 WL 3991073 (W.D. Ky. Mar. 22, 2019). *Trilogy Healthcare* is not binding on the Board, and we do not find it to be persuasive here. "While parties may

see also Applicant's Reply Brief, 14 TTABVUE 9-11). According to Applicant, based on evidence from their respective websites, Applicant's Services will be offered in the Miami, Florida area, whereas the Registrant's Services appear to be offered in California. (11 TTABVUE 10).

We are unpersuaded by Applicant's arguments. First, and most importantly, Applicant seeks a nationwide registration, as there are no geographic restrictions or limitations in the identification of services for Applicant's Mark. Since Registrant's Mark is also without geographic limitation, the Registrant enjoys a presumption of the exclusive right to nationwide use of its mark under Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b), regardless of the actual extent of its use. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983). Second, we find all of the aforementioned third-party evidence offered by the Examining Attorney to be highly probative of the relatedness of Applicant's Services and Registrant's Services. Finally, determining likelihood of confusion is based on the description of the services stated in the application and registration at issue, not on extrinsic evidence of actual use, such as website use. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)).

cite relevant cases from any jurisdiction, the Board relies primarily on precedent from the U.S. Court of Appeals for the Federal Circuit ('Federal Circuit'), not only because the Federal Circuit is the Board's primary reviewing court, but also because its cases address registration issues more specifically." TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.03 (2021).

Overall, Applicant's Services and Registrant's Services are related. This *DuPont* factor weighs in favor of a finding of likelihood of confusion.

B. Degree of Consumer Care

Turning to the fourth *DuPont* factor, the conditions under which the goods or services are likely to be purchased, e.g., whether on impulse or after careful consideration (i.e., consumer purchasing care), we note that purchaser sophistication or degree of care when encountering marks may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items where consumers pay little attention to the source of the products may tend to have the opposite effect. *Palm Bay Imps.*, 73 USPQ2d at 1695.

Applicant asserts that confusion is unlikely, since

[c]ustomers seeking plastic surgery are sophisticated, because they have spent hours researching the company doing the procedure, as well as the doctor, nurse, and more. It is an invasive and risky surgical procedure. This is in contrast to Registrant's services. In addition, the barrier to obtaining surgical procedures is high. Before obtaining services, the customer has to undergo rigorous pre-operative clearances, such as lab work, drug and pregnancy tests, physician approval, client intake document execution, and credit card authorization forms. Individuals seeking plastic surgery are Applicant's target demographic and are sophisticated enough to tell when a company is offering a meal plan, or a pricey surgical procedure.

(11 TTABVUE 11-12; *see also* 14 TTABVUE 6-8). Applicant, however, has not proffered any evidence to support its argument. We cannot rely on counsel's bald assertions, for "[a]ttorney argument is no substitute for evidence." *Enzo Biochem Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005). The

identifications in the application and registration are not limited to a specific type of purchaser, so we must presume that the purchasers consist of both professionals and the public, and that the standard of care for purchasing the goods or services is that of the least sophisticated potential purchaser. *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (citing *Stone Lion*, 110 USPQ2d at 1163). On this record, we find that consumers of Registrant’s Services, as well as Applicant’s cosmetic surgery and plastic surgery, include ordinary consumers.

Despite that, by their nature, cosmetic and plastic surgery services engender a higher degree of purchaser care, since cosmetic and plastic surgery services can be invasive, and overall, the services involve one’s personal appearance, health, and well-being. Evidence entered into the record by the Examining Attorney shows that the average cost for breast augmentation surgery, which is a type of cosmetic plastic surgery,¹⁴ can range from \$6,500 to \$7,500,¹⁵ which is not an insignificant amount of money for the average purchaser. Accordingly, we find that purchasers of Applicant’s Services and Registrant’s Services are likely to exercise more than an ordinary degree of care when making purchasing decisions for the respective services. *Elec. Design & Sales Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1392

¹⁴ Breast augmentation is defined as a “procedure in cosmetic plastic surgery designed to increase the size of the female breast usually by implanting a silicone oil-filled silicone rubber bag.” COLLINS DICTIONARY OF MEDICINE (2005) (<https://medical-dictionary.thefreedictionary.com/Breast+augmentation>) (last accessed Apr. 20, 2022). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

¹⁵ Oct. 5, 2021 Request for Reconsideration Denied at 28.

(Fed. Cir. 1992) (“[T]here is always less likelihood of confusion where goods are expensive and purchased after careful consideration.”). The higher degree of care exercised by these purchasers weighs against a finding of likelihood of confusion.


C. The Similarity or Dissimilarity of the Marks

Finally, we consider the *DuPont* factor relating to the similarity or dissimilarity of the marks. In comparing the marks we must consider their appearance, sound, connotation and overall commercial impression when considered in their entireties. *Palm Bay Imps.*, 73 USPQ2d at 1692. Similarity as to any one of these factors may be sufficient to support a finding that the marks are confusingly similar. *See Krim- Ko Corp. v. Coca- Cola 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.”); *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.”), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. Sept. 13, 2019) (quoting *In re Davia*, 110 USPQ2d at 1812).

“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.” *In re i.am.symbolic*, 123 USPQ2d at 1748 (quoting *Coach Servs.*, 101 USPQ2d at 1721); *see also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (“[M]arks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison.”). Our analysis must focus

on the recollection of the average purchaser — here, an ordinary consumer of cosmetic surgery and plastic surgery services — who normally retains a general, rather than specific, impression of service marks.

In addition, descriptive or disclaimed matter is often “less significant in creating the mark’s commercial impression,” *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001), and may be given little weight. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant asserts that the marks are “sufficiently different” when viewed as a whole, citing the unpublished¹⁶ Federal Circuit opinion, *Miguel Torres, S.A. v. Bodegas Muga, S.A.*, No. 05-1520, 176 Fed. App’x 124 (Fed. Cir. Apr. 10, 2006). (11 TTABVUE 8-9). In *Miguel Torres*, the Federal Circuit affirmed the dismissal of an opposition by the Board, which found that registrant’s mark, TORRES, for wine, and applicant’s composite mark,  *Torre Muga*, also for wine, were distinct in appearance, sound, connotation, and commercial impression. Also before the Board,

¹⁶ “While parties may cite relevant cases from any jurisdiction, the Board relies primarily on **precedent** from the U.S. Court of Appeals for the Federal Circuit (‘Federal Circuit’), not only because the Federal Circuit is the Board’s primary reviewing court, but also because its cases address registration issues more specifically.” TBMP § 801.03 (emphasis added).

the registrant failed to proffer evidence typically required to prove that a mark has acquired fame (and thus, is entitled to broad protection), or any evidence of actual confusion. *Id.* at 127-29. Applicant asserts that the facts here are similar to those in *Miguel Torres* because:

“IBody Aesthtics” [sic] is quite distinct and provides a different commercial impression. Applicant’s Mark starts with the pronunciation of the letter “I” followed by “Body” and then “Aesthetics,” a total of six syllables and with emphasis on the “I.” Registrant’s mark immediately begins with the word “the,” minimizing the “I” in “IBody” and only contains four syllables. This difference in sound and pronunciation, coupled with the design element in the Registrant [sic] mark, eliminates any likelihood of confusion. Consumers will visually see that the Registrant’s mark is different from the Applicant’s mark, and consumers will audibly determine that the marks are separate by the different emphasis on pronunciation inherent in the design of each mark.

Applicant’s Brief, 11 TTABVUE 8-9.

We find, however, that the marks at issue here are similar in sound, appearance, connotation, and overall commercial impression. For rational reasons, we may give more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Viterra*, 101 USPQ2d at 1908.

Applicant’s Mark and Registrant’s Mark share the literal element “IBODY,” which we find to be the dominant element of each mark. “IBODY” appears first in Applicant’s Mark. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1998) (first part of a mark “is most likely to be impressed upon the mind of a purchaser and remembered”). And although there is no correct pronunciation of a



mark, *Centraz Indus., Inc. v. Spartan Chem. Co., Inc.*, 77 USPQ2d 1698, 1701 (TTAB 2006), we find that the element “IBODY” is likely to be pronounced similarly in both marks, with the introductory long “I” sound being followed by the word “BODY.”

“AESTHETICS,”¹⁷ which is the second element of Applicant’s Mark, is descriptive of Applicant’s cosmetic and plastic surgery services and disclaimed. The disclaimer reduces the significance of “AESTHETICS” in the likelihood of confusion analysis, since consumers are less likely to rely on descriptive or generic wording to identify source. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (in comparing THE DELTA CAFÉ and DELTA, the generic term “CAFÉ” lacked sufficient distinctiveness to create a distinct commercial impression). While we do not ignore “AESTHETICS,” “the non-source identifying nature of the word[] and the disclaimer[] thereof constitute rational reasons for giving [the] term less weight in the analysis.” *In re Detroit Athletic*, 128 USPQ2d at 1049.

In Registrant’s Mark, the literal element “IBODY” appears at the base of the mark, below the literal element, “THE.” Although “THE” appears in the center of the mark, breaking a horizontal line, it is in very small font and is not distinguishing of source, since “the” at the beginning of a mark generally will not affect or otherwise diminish the overall similarity between the marks. *See In re Thor Tech, Inc.*,

¹⁷ We take judicial notice of the definition of the adjective “aesthetic” as “done or made to improve a person’s appearance or to correct defects in a person’s appearance: *aesthetic* plastic surgery.” MERRIAM- WEBSTER DICTIONARY (2022) (<https://www.merriam-webster.com/dictionary/aesthetic>) (last accessed Apr. 19, 2022).

90 USPQ2d 1634, 1635 (TTAB 2009) (finding WAVE and THE WAVE “virtually identical” marks; “The addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance.”); *In re Narwood Prods., Inc.*, 223 USPQ 1034, 1034-35 (TTAB 1984) (finding THE MUSIC MAKERS and MUSIC-MAKERS “virtually identical” marks; the inclusion of the definite article “the” is “insignificant in determining likelihood of confusion”). As a result, we find that the word “THE” has no significant effect on the overall commercial impression of Registrant’s Mark.


As to the design elements of Registrant’s Mark, , we find that the butterfly design is visually subordinate to the literal element “IBODY,” even though the butterfly is centrally positioned at the apex of the mark. We accord greater weight to “IBODY” because it is prominently positioned in large, stylized font, and is the portion of the mark that purchasers will use to refer to or request the services. *See In re Viterra*, 101 USPQ2d at 1911. Furthermore, the prominence of “IBODY” at the base of the composite mark catches the viewer’s eye: “IBODY” serves to draw the viewer’s eye up through the element “THE,” the butterfly’s abdomen, thorax, and head, and out through its wings. The horizontal line in Registrant’s Mark, , is non-distinctive, so we accord no weight to it, for designs in composite marks consisting of common shapes, such as lines, are not regarded as indicia of origin for the services to which they are applied absent evidence of distinctiveness of the design alone. *See Permatex Co., Inc., v. Cal. Tube Prods., Inc.*, 175 USPQ 764, 766 (TTAB 1972).

With regard to Registrant's Mark overall, we find no reason to deviate from the general rule that "[i]n the case of a composite mark containing both words and a design, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed." *In re Viterra*, 101 USPQ2d at 1908 (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)); *see also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) ("In the case of marks, such as Applicant's, consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.").

For its last argument, Applicant insists that its mark should proceed to registration merely because the Office has registered similar marks with similar characteristics. (11 TTABVUE 12). However, it is well established that each case must be assessed and decided on its own facts and record; the USPTO's allowance of prior registrations is not binding on the Board, regardless of what past actions may have been taken by the Office. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("The Board must decide each case on its own merits.").

Given the identical literal element found in both marks — IBODY — which is dominant in both, and the overall similarity of the marks in appearance, connotation, and commercial impression, we find the first *DuPont* factor also weighs in favor of finding a likelihood of confusion.

II. Conclusion

Balancing all of the relevant likelihood of confusion factors, we find that on this record, confusion is likely between Applicant's Mark, IBODY AESTHETICS, for "Cosmetic and plastic surgery; Plastic surgery," in International Class 44, and Registrant's Mark, , given the related services, identical classes of purchasers, and the similarities of the marks in appearance, connotation, and overall commercial impression. The greater degree of care that consumers of the involved services are likely to exercise does not outweigh the similarities of the marks, services, and classes of purchasers.

Decision: The refusal to register Applicant's Mark, IBODY AESTHETICS, in International Class 44 for "Cosmetic and plastic surgery; Plastic surgery," is affirmed under Trademark Act Section 2(d) on the ground of likelihood of confusion.