

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 6, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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In re GRAIL, LLC

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Serial No. 90777742
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Donald A. Thompson of Thompson & Co.,
for GRAIL, LLC.

Amber Barreda, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

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Before Pologeorgis, Coggins, and Allard,
Administrative Trademark Judges.

By the Board:

NOTICE OF CORRECTION

On August 29, 2024, the Board issued a final decision in connection with the above noted ex parte appeal. The posted decision has a typographical error that must be corrected. The error in the posted decision is listed below:

On page 10, subheading 1 reads as follows:

“1. Conceptual Strength of the Cited QUACUITY Mark.”

The decision is corrected so that subheading 1 on page 10 now reads:

“1. Conceptual Strength of the Cited QIACUITY Mark.”

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A corrected copy of the Board's final decision is attached.

Applicant's time for filing an appeal or commencing a civil action regarding the Board's decision continues to run from the mailing date of the August 29, 2024 decision. *See* Trademark Rule 2.145(d)(1), 37 C.F.R. §2.145(d)(1).

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Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

GRAIL, LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark **ACUITI** for the following services:¹

Providing temporary use of on-line non-downloadable software and applications for use in studying, diagnosing or screening for cancer; providing temporary use of on-line non-downloadable cloud computing software for use in studying, diagnosing or screening cancer; all of the foregoing services provided to physicians, nurses, and other healthcare clinicians, in International Class 42; and

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¹ Application Serial No. 90777742, filed on June 16, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a bona fide intention to use the mark in commerce for both identified classes.

Genetic testing and reporting for medical purposes; medical testing for diagnostic or treatment purposes; medical screening; medical diagnostic testing, monitoring and reporting services; providing a website featuring medical information regarding genetics; genetic analysis and reporting services for medical purposes; all of the foregoing services provided to physicians, nurses, and other healthcare clinicians, in International Class 44.

The Trademark Examining Attorney 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 standard character mark **QIACUITY** registered on the Principal Register for use in connection with, in relevant part, the following services:²

Scientific research for others in the fields of genetics, biology and biochemistry; scientific diagnostic services for others in the fields of DNA, RNA detection and analysis, in International Class 42; and

Testing services, namely, quantifying DNA and RNA for medical, diagnostic and treatment purposes; RNA or DNA analysis for cancer diagnosis and prognosis; medical services, in particular medical analysis in connection with the treatment of individuals; providing information in the fields of medicine, veterinary medicine and diagnostic, prophylactic and therapeutic properties of pharmaceuticals, in International Class 44.

When the refusal was made final, Applicant appealed. The appeal is fully briefed.

For the reasons explained below, we affirm the Section 2(d) refusal to register.³

² Registration No. 6458294, issued August 24, 2021. The cited registration also lists goods in International Classes 1, 5, 9 and 10, as well as additional services in International Classes 42 and 44. These goods and services, however, do not form the basis of the Examining Attorney's Section 2(d) refusal and, therefore, we have given them no consideration in our analysis. Additionally,

³ The TTABVue and Trademark Status and Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents. Additionally, as part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases,

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1314-15 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant and for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1378-79 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Notwithstanding, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973) (internal citations removed).

A. Relatedness of the Services

We first turn to the comparison of the services, the second *DuPont* factor. In making our determination, we must look to the services as identified in Applicant’s application and the relevant services listed in the cited registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting

citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For opinions of the Board, this opinion uses citations to the Westlaw legal database and cites only precedential decisions, unless otherwise noted.

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Octocom Sys., Inc. v. Hous. Comput. Servs. Inc., 918 F.2d 937, 942 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”); *see also In re Giovanni Food Co.*, (Serial No. 77796257) 2011 WL 810217, at *2 (TTAB 2011).

It is sufficient to support a finding of likelihood of confusion if the respective services are related in some manner, or if the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originate from the same source. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (internal citation omitted); *Hilson Rsch., Inc. v. Soc’y for Human Res. Mgmt.*, (Cancellation No. 19007), 1993 WL 290669, at *9 (TTAB 1993). The issue here is not whether consumers would confuse Applicant’s services with Registrant’s services, but rather whether there is a likelihood of confusion as to the source of these services. *L’Oreal S.A. v. Marcon*, (Opposition No. 91184456), 2012 WL 1267956, at *6 (TTAB 2012); *In re Rexel Inc.*, (Serial No. 241423), 1984 WL 63591, at *1 (TTAB 1984). Moreover, registration must be refused if Applicant’s mark for any of its identified services is likely to cause confusion with Registrant’s mark for any of its relevant listed services. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (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, 1336-37 (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).

Applicant's Class 44 services include the following: "Genetic testing and reporting for medical purposes . . . provided to physicians, nurses, and other healthcare clinicians." The cited registration includes the following Class 44 services: "Testing services, namely, quantifying DNA^[4] and RNA^[5] for medical, diagnostic and treatment purposes." Applicant's aforementioned genetic testing services are broad enough to encompass the genetic testing services identified above listed in the cited registration. As such, Applicant's and Registrant's Class 44 services are legally identical in part. *In re Solid State Design Inc.*, (Serial No. 87269041), 2018 WL 287909, at *6 (TTAB 2018) (where the goods or services in an application or registration are broadly described, they are deemed to encompass all the goods or

⁴ "DNA" is defined as "a nucleic acid that carries the **genetic information** in cells and some viruses, consisting of two long chains of nucleotides twisted into a double helix and joined by hydrogen bonds between the complementary bases adenine and thymine or cytosine and guanine." (emphasis added) (ahdictionary.com accessed July 10, 2024 – AMERICAN HERITAGE DICTIONARY). 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*, (Serial No. 85214191), 2014 WL 1390504, at *2 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594 (Fed. Cir. 2016).

⁵ "RNA" is defined as "a nucleic acid present in all living cells and many viruses, consisting of a long, usually single-stranded chain of alternating phosphate and ribose units, with one of the bases adenine, guanine, cytosine, or uracil bonded to each ribose molecule. RNA molecules are involved in protein synthesis and sometimes in the transmission of **genetic information**." (emphasis added) (ahdictionary.com accessed July 10, 2024 – AMERICAN HERITAGE DICTIONARY).

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services of the nature and type described therein); *Sw. Mgmt., Inc. v. Ocinoled, Ltd.*, (Concurrent Use No. 94002242), 2015 WL 4464550, at *17 (TTAB 2015) (same); *In re Elbaum*, (Serial No. 73247348), 1981 WL 40489, at *1 (TTAB 1981) (same).

Applicant's Class 42 services are identified as providing temporary use of on-line non-downloadable software and applications, as well as cloud computing software, for use in studying, diagnosing or screening for cancer, provided to physicians, nurses, and other healthcare clinicians. The cited registration includes the following services in Class 44: "medical services, in particular medical analysis in connection with the treatment of individuals." We find Registrant's "medical services, in particular medical analysis in connection with the treatment of individuals" in Class 44 and Applicant's Class 42 services highly related insofar as the purpose of both the services is to analyze medical diseases and conditions. We additionally find that Registrant's "RNA or DNA analysis for cancer diagnosis and prognosis," in International Class 44 and Applicant's Class 42 services, on their face, are closely related because of the inherent relationship between the services, i.e., methods and tools for diagnosing cancer.

In sum, we find that (1) Applicant's Class 44 services are legally identical in part to Registrant's Class 44 services, and (2) Applicant's Class 42 services are closely related to Registrant's "medical services, in particular medical analysis in connection with the treatment of individuals" and "RNA or DNA analysis for cancer diagnosis

and prognosis,” in Class 44.⁶ *See e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (holding that the respective identifications of goods were, themselves, evidence as to the relatedness of the parties’ goods and extrinsic evidence of relatedness was not per se required); *In re Country Oven, Inc.*, (Serial No. 87354443), 2019 WL 6170483, at *3 (TTAB 2019) (“We find that the identifications in the application and registration themselves support finding the . . . services are related.”). Accordingly, the second *DuPont* factor heavily favors a finding of likelihood of confusion.

B. Similarity of Trade Channels

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because Applicant’s and Registrant’s Class 44 services are legally identical in part, we must presume that the legally identical in part services travel through the same channels of trade and are offered to the same or overlapping classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 754 (CCPA 1968) (where there are legally

⁶ The difference in the classification of services between Applicant’s Class 42 services and Registrant’s listed Class 44 services is not relevant to the issue of relatedness. “The classification system was established for the convenience of the [Patent and Trademark] Office rather than to indicate that goods in the same class are necessarily related or that classification in different classes indicates that they are not related.” *Nat’l Football League v. Jasper All. Corp.*, (Opposition No. 77966), 1990 WL 354523, at *4 n.5 (TTAB 1990) (citing *In re Leon Shaffer Golnick Advert., Inc.*, (Serial No. unknown), 1974 WL 20158 (TTAB 1974)); *see also In Detroit Ath. Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018) (quoting *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 975 (Fed. Cir. 1993) (stating that classification is for the convenience of the Office and is “wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification”).

identical goods, the channels of trade and classes of purchasers are considered to be the same).

With regard to Applicant's Class 42 services, we find that these services are provided online by virtue of the nature of the services, i.e., the provision of a non-downloadable or cloud-based computer software program. The cited registration does not contain any restrictions as to trade channels. Thus, we presume that Registrant's relevant services are or would be marketed in all normal trade channels for such services and to all normal classes of purchasers of such services, including physicians, nurses, and other healthcare clinicians. *In re i.am.symbolic*, 866 F.3d 1315, 1327 (Fed. Cir. 2017) (quoting *In re Viterra Inc.*, 671 F.3d at 1362 and *Hewlett-Packard*, 281 F.3d at 1268). These normal trade channels could include the provision of the services online. Accordingly, the trade channels of Applicant's Class 42 services and Registrant's relevant services, at a minimum, overlap.

The classes of purchasers for Applicant's Class 42 services are limited to physicians, nurses, and other healthcare clinicians. Although the cited registration does not limit the classes of purchasers, we nonetheless find that it would be reasonable to assume, in light of the nature of Registrant's relevant services, that these services would also be provided to physicians and healthcare clinicians. Thus, at a minimum, the relevant classes of purchasers of Applicant's Class 42 services and Registrant's relevant services overlap.

Accordingly, the third *DuPont* factor also weighs strongly in favor of a finding of likelihood of confusion.

C. Strength of the Cited QIACUITY Mark

Before we make our comparison of the marks, we consider the strength, as well as any weakness, of the cited QIACUITY mark as used in connection with the relevant services listed in the cited registration. We do so because a determination of the strength or weakness of this mark helps inform us as to its scope of protection. *See In re Morinaga Nyugyo K.K.*, (Serial No. 86338392), 2016 WL 5219811, at *6 (TTAB 2016) (“[T]he strength of the cited mark is — as always — relevant to assessing the likelihood of confusion under the *du Pont* framework.”).

When evaluating the strength or weakness of a mark, we look at the mark’s inherent strength based on the nature of the term itself, and its commercial strength in the marketplace. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength); *see also Made in Nature, LLC v. Pharmavite LLC*, (Opposition Nos. 91223352 (parent), 91223683 and 91227387), 2022 WL 2188890, at *11-12 (TTAB 2022) (quoting *DuPont*, 476 F.2d at 1361); *New Era Cap Co. v. Pro Era LLC*, (Opposition No. 91216455), 2020 WL 285382, at 12 (TTAB 2020) (“ [T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.”) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003)).

With regard to commercial strength, “[t]he proper standard is the mark’s ‘renown within a specific product market,’ ... and ‘is determined from the viewpoint of consumers of like products,’ ..., and not from the viewpoint of the general public.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017).

1. Conceptual Strength of the Cited QIACUITY Mark

Conceptual strength is a measure of a mark's distinctiveness and may be placed "in categories of generally increasing distinctiveness: . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

Because the cited mark QIACUITY issued on the Principal Register, without a claim of acquired distinctiveness, the mark is presumed to be inherently distinctive for the services listed in the cited registration. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, (Opposition No. 91118587), 2006 WL 2460188, at *21 (TTAB 2006) (a "mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods").

The Federal Circuit has held, however, that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the mark or common element has some non-source identifying significance that undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) ("[E]vidence of third-party registrations is relevant to 'show the sense in which a mark is used in ordinary parlance,' ... that is, some segment that is common to both parties' marks may have 'a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that segment is relatively weak'") (quoting *Juice Generation*,

Inc. v. GS Enters. LLC, 794 F.3d 1334, 1339 (Fed. Cir. 2015)).

Here, Applicant did not submit any third-party registrations for marks identical or similar to the cited mark QIACUITY for identical or similar services. Because there is no evidence of record to demonstrate that the cited QIACUITY mark for the relevant services listed in the cited registration is conceptually or inherently weak, we find that the cited QIACUITY mark is entitled to the normal scope of protection due an inherently distinctive mark.

2. Commercial Strength of the Cited QIACUITY Mark

a. Fifth *DuPont* Factor

The fifth *DuPont* factor examines the extent to which the public perceives the mark as indicating a single source of origin, i.e., its fame or commercial strength. *DuPont*, 476 F.2d at 1361. However, as is typical in an ex parte proceeding, the record in this case provides no basis for a finding that the cited mark is commercially strong when used in association with Registrant's relevant services. "[I]n an ex parte appeal the 'fame of the mark' factor is normally treated as neutral because the record generally includes no evidence as to fame, particularly since the owner of the cited registration is not a party to this proceeding and thus cannot introduce evidence regarding its use of the cited registered mark. See *In re Thomas*, (Serial No. 78334625), 2006 WL 1258862, at *6 n.11 (TTAB 2006). Thus, the fifth *DuPont* factor is neutral.

b. Similar Marks on Similar Services – 6th *DuPont* Factor

We next address the sixth *DuPont* factor, the number and nature of similar marks in use on similar goods and services. *Primrose Ret. Cmty., LLC v. Edward Rose*

Senior Living, LLC, (Opposition No. 91217095), 2016 WL 7655551, at *4-5 (TTAB 2016). The Federal Circuit has held that evidence of extensive registration and use of a term by others for similar goods or services can be “powerful” evidence of the term’s weakness. *Jack Wolfskin*, 797 F.3d at 1373-74; *Juice Generation*, 794 F.3d at 1339. If the evidence establishes that the consuming public is exposed to widespread third-party use of similar marks for similar goods or services, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005).

Applicant has not submitted any evidence concerning third-party marketplace uses of marks identical or similar to the cited mark QIACUITY for services identical or similar to those listed in the cited registration. Thus, the sixth *DuPont* factor is neutral.

3. Summary of the Strength of the Cited Mark

In sum, there is no evidence of record which demonstrates that the cited QIACUITY mark is either conceptually or commercially weak for the relevant services listed in the cited registration. Rather, the record shows that the cited QIACUITY mark is inherently distinctive and, therefore, is entitled to the normal scope of protection afforded inherently distinctive marks.

D. Similarity of the Marks

We next consider the first *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imps.*, 396 F.3d at 1371 (quoting *DuPont*, 476 F.2d at

1361). 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, 732 (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*, (Serial No. 87075988), 2018 WL 2734893, at *5 (TTAB 2018) (“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.”) (quoting *In re Davia*, (Serial No. 85497617), 2014 WL 2531200, at *2 (TTAB 2014)).

“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*, 866 F.3d at 1323 (quoting *Coach Servs. Inc.*, 668 F.3d at 1368) (internal quotation marks omitted). Furthermore, because Applicant’s Class 44 services are legally identical in part to Registrant’s Class 44 services, and Applicant’s Class 42 services are closely related to Registrant’s Class 44 services, the degree of similarity between the marks that is required to support a finding of likelihood of confusion declines. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992).

Applicant’s mark is **ACUITI** in standard characters. The cited mark is **QIACUITY** also in standard characters. When considered in their entireties, we find Applicant’s mark and Registrant’s mark to be similar because Applicant’s mark is the phonetic equivalent of a significant portion of the cited mark.

As for appearance and pronunciation, both marks contain the same string of letters “ACUIT,” which would be pronounced identically. Additionally, based on common pronunciations of the letters “i” and “y” in American English, it is plausible that the last letter “i” in Applicant’s ACUITI mark may be pronounced as a long “e” (ē), making Applicant’s mark as a whole sound like the word “ACUITY,” which is identical in sound and appearance to a significant portion of the cited mark.

Applicant argues that the marks at issue differ in appearance, sound, connotation and commercial impression in light of the prefix “QI” in the cited mark.⁷ More specifically, Applicant contends that insofar as (1) the prefix “QI” is quite uncommon in the English language, and (2) the “QI” prefix has an alternative spelling of “Chi,” which Applicant maintains is defined as “vital energy that is held to animate the body internally” and is of central importance in some Eastern systems of medical treatment (such as acupuncture), relevant consumers would not confuse the marks at issue.⁸ Applicant also maintains the “QI” prefix is the primary, dominant, and most memorable element of the cited mark and, as a result, relevant consumers can differentiate the marks at issue so as to avoid any likely confusion.

In support of its arguments, Applicant heavily relies on the Board’s nonprecedential decision in *In re Q’Sai Co., Ltd.*, (Serial No. 79157321), 2017 WL 6033942 (TTAB 2017). In that decision, the Board, basing its holding solely on the first *DuPont* factor as being dispositive, found that the applicant’s proposed standard

⁷ Applicant’s Appeal Brief, p. 3; 4 TTABVUE 5.

⁸ *Id.* at pp. 3-4; 4 TTABVUE 5-6.

character mark Q'SAI was sufficiently different than the cited mark SAI, also in standard characters, so as to avoid any likely confusion.

We are not persuaded by Applicant's arguments. First, the Board does not encourage the citation to nonprecedential decisions because they are not binding on the Board, nor are they a substitute for evidence needed to support or traverse a refusal. See *In re tapio GmbH*, (Serial No. 87941532), 2020 WL 6938377, at *10 n.34 (TTAB 2020) (Board found unpersuasive nonprecedential decisions decided on different records); *In re Soc'y of Health and Physical Educators*, (Serial No. 87107590), 2018 WL 3994009, at *3 n.7 (TTAB 2018) ("Board decisions which are not designated as precedent are not binding on the Board, but may be cited and considered for whatever persuasive value they may hold."). In any event, we find that the factual circumstances in the *In re Q'Sai* decision are distinguishable from those in this ex parte appeal. Indeed, it has long been the law that "past decisions on confusing similarity are of little assistance in new fact situations wherein entirely different marks and products [or services] are involved." *Medicated Prods. Co. v. Alice Jewelry Co.*, 255 F.2d 408, 408 (CCPA 1958).

Turning back to the marks at issue, we note that there is no evidence of record that the "QI" prefix in the cited mark was intended by Registrant to have the meaning Applicant contends. In fact, the owner of the cited registration is Qiagen GmbH. Thus, it would be reasonable to assume that the "QI" prefix is an abbreviation of the registration owner's business name and not the meaning attributed by Applicant. Nor

is there any evidence of record that relevant consumers would prescribe such a meaning or connotation to the QI prefix.

In any event, Applicant has merely adopted the phonetic equivalent of a significant portion of the cited mark. Adding or deleting terms from a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d). *See Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557 (CCPA 1975) (holding BENGAL and BENGAL LANCER and design confusingly similar); *Double Coin Holdings, Ltd. v. Tru Dev.*, (Cancellation No. 92063808), 2019 WL 4877349, at *8-9 (TTAB 2019) (holding ROAD WARRIOR and WARRIOR (stylized) confusingly similar); *In re Mr. Recipe, LLC*, (Serial Nos. 86040643 and 86040656), 2016 WL 1380730, at *6-8 (TTAB 2016) (holding JAWS DEVOUR YOUR HUNGER and JAWS confusingly similar); *In re Toshiba Med. Sys. Corp.*, (Serial No. 79046106), 2009 WL 1896059, at *4-5 (TTAB 2009) (holding TITAN and VANTAGE TITAN confusingly similar); *In re El Torito Rests., Inc.*, (Serial No. 597,060), 1988 WL 252343, at *2 (TTAB 1988) (holding MACHO and MACHO COMBOS confusingly similar).

Moreover, since the cited mark is in standard characters, it may be displayed in any font style, size or color. Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). In other words, we must anticipate Registrant's cited mark being displayed in a manner in

which there is more emphasis on the latter part of the mark, e.g., **qiACUITY**,⁹ thereby appearing quite similar to Applicant's **ACUITI** mark and both evoking the term ACUITY which is defined as "keenness of perception."¹⁰ As such, both marks are similar in connotation and overall commercial impression.

Additionally, the purported rarity of the letters "QI" does not appear to change the visual impression of the cited mark because the visual presentation of the cited mark forms a single word, which when viewed in its entirety suggests that it is part of an ACUITY brand. Because average consumers retain a general rather than specific impression of trademarks, they are likely to assume a connection between Applicant's mark and the cited mark based on the shared phonetically equivalent distinctive wording, ACUITI/ACUITY. As previously noted, marks may be confusingly similar in appearance despite the addition, deletion, or substitution of letters or words. *See, e.g., Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546 (Fed. Cir. 1990) (finding TMM confusingly similar to TMS); *In re Pellerin Milnor Corp.*, (Serial No. 280084), 1983 WL 51846 (TTAB 1983) (finding MILTRON and MILTRONICS confusingly similar); *In re BASF A.G.*, (Serial No. unknown), 1975 WL 20946 (TTAB 1975) (finding difference between marks LUTEX and LUTEXAL insufficient to avoid source confusion).

⁹ We note that the cited mark appears on the drawing page as **QIAcuity**, but this does not change the nature of the mark from standard character to special form and does not preclude its presentation as qiACUITY. *New Era Cap Co. v. Pro Era, LLC*, (Opposition No. 91216455), 2020 WL 2853282, at *1 n.1 (TTAB 2020).

¹⁰ September 16, 2022 Response to Office Action, Exh. 6, TSDR pp. 33-34.

Further, even if potential purchasers realize the apparent differences between the marks, they could still reasonably assume, due to their overall similarities, that Applicant's services sold under the proposed mark constitute new or additional services from the same source as the services provided under the cited registered mark with which they are acquainted or familiar, and that Applicant's mark is merely a variation of, or derivative of, Registrant's mark. *See, e.g., In re Comexa Ltda.*, (Serial No. 75396043), 2001 WL 717676 (TTAQB 2001) (applicant's use of term "AMAZON" and parrot design for chili sauce and pepper sauce is likely to cause confusion with registrant's "AMAZON" mark for restaurant services); *SMS, Inc. v. Byn-Mar Inc.*, (Opposition No. 91068062), 1985 WL 71967 (TTAB 1985) (applicant's marks ALSO ANDREA and ANDREA SPORT were "likely to evoke an association by consumers with opposer's preexisting mark [ANDREA SIMONE] for its established line of clothing."); *In re Collegian Sportswear, Inc.*, (Serial No. 326,917), 1984 WL 63155 (TTAB 1984).

Finally and as previously noted, there is no evidence of use by third parties of similar marks on similar services that might dilute the source-identifying capacity of the cited mark QIACUITY for the relevant services listed in the cited registration.

In sum, while there are some specific differences between Applicant's and Registrant's marks, i.e., the inclusion of the prefix "QI" in the cited mark and the phonetically equivalent but misspelled term that comprises the entirety of Applicant's proposed mark, namely, ACUITI, we nonetheless find that, in their entireties, the marks are more similar than dissimilar in appearance, sound,

connotation, and overall commercial impression due to the common presence of the phonetically identical term “acuity.” The first *DuPont* factor thus favors a finding of likelihood of confusion.

E. Sophistication of Consumers

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*, 476 F.2d at 1361. Applicant contends that, given the complex nature of the involved services, buyers of Applicant’s and Registrant’s services, as well as potential customers for the services, plainly are highly educated, sophisticated purchasers who know their needs and would be expected to exercise a great deal of care.¹¹

We agree that in view of the inherent nature of the respective services, Applicant’s and Registrant’s potential or actual consumers will exercise a relatively high degree of purchasing care. Generally, purchasers of medical equipment or diagnostic services, whether hospital personnel or physicians, are highly sophisticated and thus are more likely to distinguish between marks and goods/services than is the general consuming public. *See, e.g., In re N.A.D.*, 754 F.2d 996, 999-1000 (Fed. Cir. 1985) (“The record shows the machines to be elaborate, sizeable, complex pieces of technical apparatus of the kind which would be purchased only in consultation with an anesthesiologist or someone with equivalent technical knowledge. In other words, only very sophisticated purchasers are here involved who would buy with great care and unquestionably know the source of the goods.”).

¹¹ Applicant’s Appeal Brief, p. 6; 4 TTABVue 8.

We thus find this factor weighs against a finding of likelihood of confusion.

II. Balancing of *DuPont* Factors

We have considered all of the arguments and evidence of record and all relevant *DuPont* factors. We find that (1) the marks at issue are more similar than dissimilar, (2) Applicant's services and Registrant's services are legally identical in part or otherwise closely related, (3) the legally identical in part services are presumed to travel in identical trade channels and offered to identical classes of purchasers, and (4) the parties' closely related services travel, at a minimum, in overlapping trade channels and offered to overlapping relevant classes of purchasers. As such, we conclude that Applicant's ACUITI mark, as used in connection with the identified services, so resembles the cited mark QIACUITY for the relevant listed services in the cited registration as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act, notwithstanding the sophistication of the potential and actual relevant consumers of the parties' respective services.

In the final analysis, in weighing the relative importance of the conflicting fourth *DuPont* factor, we must take into account that "even sophisticated purchasers are not immune from source confusion, especially in cases such as the instant one involving similar marks and [legally identical in part or otherwise related services]," *In re Cook Med. Techs., LLC*, (Serial No. 77882876), 2012 WL 8254584, at *7 (TTAB 2012), and that there may be "no reason to believe that medical expertise as to [these services] will obviate confusion as to source or affiliation or other factors affecting goodwill." *Id.* (quoting *Kos Pharms. Inc. v. Andrx Corp.*, 369 F.3d 700, 717 (3d Cir. 2004)). *See also HRL Assocs., Inc. v. Weiss Assocs., Inc.*, (Opposition No. 76632), 1989 WL 274391,

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at *4 (TTAB 1989) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods), *aff'd*, *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546 (Fed. Cir. 1990). We find that confusion is likely because the first, second, and third *DuPont* factors outweigh the fourth *DuPont* factor regarding the purchase conditions and sophistication of the purchasers. *Cook Med. Techs.*, 2012 WL 8254584, at *7; *In re Cynosure, Inc.*, (Serial No. 76653359), 2009 WL 1268438, at *5 (TTAB 2009).

Decision: The refusal to register Applicant's ACUITI mark under Section 2(d) of the Trademark Act is affirmed.