

This Opinion is Not a  
Precedent of the TTAB

Mailed: October 4, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Donald Dudley*

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Serial No. 87655327

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Geoffrey M. Dureska of Dunlap, Bennett & Ludwig, PLLC  
for Donald Dudley.

Laura Wright, Trademark Examining Attorney, Law Office 125,  
Heather Biddulph, Managing Attorney.

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Before Adlin, Lynch, and English,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Donald Dudley (“Applicant”) seeks registration on the Principal Register of the mark INTEGRATED PERFORMANCE CARE SYSTEMS in standard characters, with a disclaimer of CARE SYSTEMS, for “Acupuncture services; Chiropractic services; Massage therapy services; Physical rehabilitation” in International Class

44.<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark



for “Chiropractic services” in International

Class 44.<sup>2</sup> The registration contains the following description:

The mark consists of the stylized letters “V” and “P” separated by a polygon containing the silhouettes of two men superimposed over each other, with their arms outstretched, one with its legs together and the other with its legs stretched apart, with a curved horizontal line above and another curved horizontal line below the letters and the design of the silhouettes, all in gold, above the stylized wording “VICTORY INTEGRATED PERFORMANCE” in white, all shown against a black background.

The colors gold, black and white are claimed as a feature of the mark.

After the Examining Attorney made the refusal final, Applicant appealed. The appeal has been fully briefed. For the reasons set forth below, we reverse the refusal to register.

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<sup>1</sup> Application Serial No. 87655327 was filed October 23, 2017 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged intent to use the mark in commerce.

<sup>2</sup> Registration No. 4945213 issued April 28, 2015.

## II. Likelihood of Confusion

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Two key considerations are the similarities between the marks and the relatedness 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 [or services] and differences in the marks.”).

### A. The Services, Trade Channels, and Classes of Consumers

In analyzing the second *DuPont* factor, we look to the identifications in the application and cited registration. *See Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). As Applicant has acknowledged,<sup>3</sup> the services are identical in part to the extent Applicant recites chiropractic services, which the cited registration also identifies.<sup>4</sup>

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<sup>3</sup> 4 TTABVUE 10 (Applicant’s Brief).

<sup>4</sup> The Examining Attorney also submitted evidence demonstrating the relatedness of Applicant’s other services to the chiropractic services in the cited registration. TSDR October

Because the services in the cited registration are identical in part to Applicant's, we presume that they travel through the same channels of trade to the same class of purchasers, considerations under the third *DuPont* factor. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)).

These factors weigh heavily in favor of likely confusion.

#### B. Similarity of the Marks

We next compare INTEGRATED PERFORMANCE CARE SYSTEMS to



“in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps., Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *In re i.am.symbolic*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citations omitted).

In the cited mark, the larger and more eye-catching top portion consists of letters and design elements that appear in gold, while the bottom portion consists of wording in much smaller font that appears in white. We find the top portion of the mark

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25, 2019 Office Action at 2-33 (third-party website evidence showing the relevant services offered under the same mark).

dominant for a number of reasons. As the first part of the mark to be read and seen, the top portion “is most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988); *see also Palm Bay Imps.*, 73 USPQ2d at 1692. The letters V and P, and a design element in between, are set off by substantial arcs above and below. This larger top portion stands out against the black background in terms of color as well as size. The pictorial element occupies a prominent central place in the mark, and consists of a male silhouette reminiscent of Leonardo da Vinci’s Vitruvian Man.<sup>5</sup> Consumers likely would perceive the pictorial element not only as a design, but also as standing in for the letter “I,” as it appears roughly in the shape of a capital “I.” The design is placed in between the similarly proportioned and colored letters “V” and “P,” and, as the Examining Attorney contends, the “image looks like a stylized letter ‘I.’”<sup>6</sup> Thus, the top portion could be viewed as the initialism VIP, standing for VICTORY INTEGRATED PERFORMANCE in this mark. In addition, as used in ordinary parlance, a VIP connotes “a person of great importance or influence, especially a dignitary who commands special treatment.”<sup>7</sup> So, VIP in this mark has a laudatory

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<sup>5</sup> Applicant acknowledged this association with the Vitruvian Man. 4 TTABVUE 7 (Applicant’s Brief).

<sup>6</sup> 6 TTABVUE 8 (Examining Attorney’s Brief).

<sup>7</sup> We take judicial notice of the entry for “VIP” from the free dictionary.com, sourced from The American Heritage Dictionary of the English Language, accessed October 3, 2019. *See 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).

connotation about special treatment from the services, as well as the initialism connotation.

There is no per se rule as to the dominance of wording over design elements in composite word-and-design marks such as the cited mark. *See In re Electrolyte Labs., Inc.*, 929 F.2d 645, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (“There is no general rule as to whether letters or design will dominate in composite marks”). While “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 [services],” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *Viterra*, 101 USPQ2d at 1908), in this mark the bold lettering VIP, incorporated with the prominent design features, forms the part of the mark more likely to be remembered by consumers and used to call for the services. As in *In re Covalinski*, 113 USPQ2d 1166, 1168 (TTAB 2014), the cited “design mark includes the very large, prominently displayed letters,” with “graphic devices” that draw attention to the [] letters apart from the wording.” *See also id.* at 1168-69 (discussing other cases where design features were more dominant than wording). In fact, some consumers could perceive the less prominent INTEGRATED PERFORMANCE, or VICTORY INTEGRATED PERFORMANCE, as a marketing slogan or tagline, rather than the primary identifier of source. While we consider the mark in its entirety, including the smaller bottom portion of the mark, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature

of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

We further find that the only wording that the marks share in common, INTEGRATED PERFORMANCE, is suggestive of the relevant wellness services. INTEGRATED refers to being made “into a whole by bringing all parts together; unif[ied],”<sup>8</sup> and PERFORMANCE in this context refers to “[t]he way in which someone or something functions.”<sup>9</sup> In connection with the services at issue in both the application and the cited registration, INTEGRATED PERFORMANCE suggests the balance and unified functioning that patients may achieve through the services. The suggestiveness of this term lessens the significance of its presence in both marks, which also contain other matter. *See Rocket Trademarks Pty Ltd. v Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011) (ZU ELEMENTS (stylized) not confusingly similar to ELEMENT in connection with identical clothing goods due, in part, to suggestiveness of term “element(s)”). Thus, even though CARE SYSTEMS in Applicant’s mark has been disclaimed, thereby diminishing somewhat its significance in the comparison of the marks, *see Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1257 (Fed. Cir. 2011), “[n]o element of a mark is ignored simply

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<sup>8</sup> We take judicial notice of the entries for “integrated” and “integrate,” first definition, from the free dictionary.com, sourced from The American Heritage Dictionary of the English Language, accessed October 3, 2019.

<sup>9</sup> We take judicial notice of the entry for “performance,” third definition, from the free dictionary.com, sourced from The American Heritage Dictionary of the English Language, accessed October 3, 2019.

because it is less dominant, or would not have trademark significance if used alone.” *Electrolyte Labs.*, 16 USPQ2d at 1240. Overall, we find that the additional matter in Applicant’s mark and the other very significant elements in the cited mark avoid likely confusion. *See Kellogg Co. v. Pack’em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (dissimilarity of marks may be dispositive).

### III. Conclusion

Considered in their entirety, the differences between the marks is dispositive of no likelihood of confusion, even though the services, channels of trade and classes of consumers overlap.

**Decision:** The refusal to register Applicant’s mark is reversed.