

This Opinion is Not a
Precedent of the TTAB

Mailed: September 1, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Globus Medical, Inc.
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Serial No. 88465873
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Jon A. Schiffrin of Schiffrin & Longo PC,
for Globus Medical, Inc.

Shaunia Carlyle, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

—
Before Kuhlke, Taylor and Hudis,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Globus Medical, Inc. (“Applicant”) seeks registration on the Principal Register of the mark REFLECT (in standard characters) for a “Surgical system in the nature of a surgical implant for use with the spine composed of artificial materials” in International Class 10.¹

¹ Application Serial No. 88465873 was filed on June 10, 2019, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b).

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 that there is a likelihood of confusion with the mark in Registration No. 4879372, REFLECT (in standard characters) for "Dental implants" in International Class 10.²

When the refusal was made final, Applicant appealed. Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. Applicable Law

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). We discuss below these and other relevant factors. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019) (Board considers each *DuPont* factor for which there is evidence and argument).

² Issued January 5, 2016.

II. The Marks/Strength of the Cited Mark

A. Similarity of the Marks

We first turn to the first *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks, and compare the marks, as we must, in their entireties in terms of appearance, sound, meaning and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin En 1722*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). Applicant’s mark REFLECT is identical to Registrant’s cited mark REFLECT in sound, appearance and connotation, and is likely to convey the same commercial impression when considered in connection with Applicant’s and Registrant’s respective goods.

B. Number and Nature of Similar Marks in Use on Similar Goods

Applicant nonetheless maintains that “‘Reflect’ is a commonly used term for all types of goods and services, and consumers are not likely to be confused as to the source of products identified under Applicant’s mark and the Registrant’s mark, because they share this term.”³ According to Applicant, because of the “very common use of ‘reflect,’ this term should receive the narrowest scope of protection.”⁴ In making this argument, Applicant asserts that third-party registrations featuring “derivatives” of the word “reflect,” i.e., “reflex(x)” and “reflection,” are also relevant. As support, Applicant made of record copies of six use-based, third-party registrations

³ 4 TTABVUE 7 (Applicant’s brief, p. 3).

⁴ *Id.* at 8 (Applicant’s brief, p. 4).

for marks that include or consists of the terms REFLECT, REFLEX(X), and REFLEXION.⁵

Registration No.	Mark	Goods
5395126	REFLECT RS	Medical devices and apparatus, namely, imaging apparatus incorporating medical imaging software
5585875	REFLEXX	Orthopedic braces
2000632	REFLEX	Mechanical surgical instruments, namely staplers, staple extractors, and clip appliers
1603586	REFLEX	Guidewires for balloon catheters
1476733	REFLEX	Orthodontic appliances for use in the mouth formed from nickle [sic] titanium wire
2599392	REFLECTION	Dental impression material

The Examining Attorney questions the probative value of most of this evidence, arguing that the terms REFLEX, REFLEXX and REFLECTION are completely different words with different meanings and commercial impressions and, therefore, “the mark is not diluted for the goods.”⁶

⁵ Applicant’s February 14, 2019 Response, TSDR 20-31.

⁶ As support for this position, the Examining Attorney requests, and we take, judicial notice of the definitions of the words “reflect,” “reflex,” and “reflection,” taken from the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 6TH EDITION. Retrieved May 28, 2020, from <https://www.ahdictionary.com> “Reflect” is defined, in part, as “1: to throw or bend back (light or sound, for example) from a surface; 2: to give back or show an image of (an object); mirror; 3: to make apparent; express or manifest; 4: to bring as a consequence.” “Reflection” is defined as “1: the act of reflecting or the state of being reflected; 2: something, such as light, radiant heat, sound, or an image that is reflected; 3a: serious thinking or careful consideration; 3b; a thought or an opinion resulting from such thinking or consideration.” “Reflex” is defined as “1: being an involuntary action or response, such as a sneeze, blink or hiccup; 2: produced as an automatic response or reaction; 3: bent, turned, or thrown back.” The Board may take judicial notice of online dictionaries that exist in printed format or have regular fixed editions. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

Evidence of third-party use and registration of a term in the relevant industry is considered in the likelihood of confusion analysis. *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). Here, however, Applicant introduced no evidence of third-party use, and instead relies only on the six third-party registrations listed above. Applicant's record thus does not demonstrate commercial weakness from third-party use. See *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) ("But Applicant's citation of third-party registrations as evidence of market weakness is unavailing because third-party registrations, standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences."); *In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) ("the mere existence of third-party registrations is not evidence that the registered marks are actually in use or that the public is familiar with them.").

However, even where there is no record evidence of third-party use, third-party registration evidence may show conceptual weakness, in that a term carries a highly suggestive or descriptive connotation in the relevant industry. See *Juice Generation*, 115 USPQ2d at 1675 ("Third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the

conclusion that that segment is relatively weak.”) (citations omitted). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services).

In this case, Applicant’s evidence does not establish conceptual weakness of Registrant’s REFLECT mark. Of the six third-party registrations Applicant made of record, four are for marks that do not comprise the term REFLECT. In view of the definitions of record, we are not convinced that the term REFLEX(X) is a derivative of the word REFLECT such that marks including those three terms would impart the same or very similar commercial impressions. Only two registrations are for marks, i.e., REFLECT RS and REFLECTION, that are similar to the REFLECT mark at issue in this proceeding. The existence of two registrations is not enough to narrow the scope of protection of the cited registration. *Cf. Promark v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1244 (TTAB 2015) (“Such third-party registrations and uses are competent to show that the common term has an accepted meaning in a given field.”). In view thereof, we accord Registrant’s mark REFLECT an ordinary scope of protection.

At bottom, the shared term REFLECT is the sole element in both Applicant’s and Registrant’s marks. Even if, as Applicant suggests, it was entitled to a narrow scope of protection, and on this record it is not, there are no additional terms or other matter that would distinguish Applicant’s mark from the cited mark. Moreover, even weak

marks are entitled to protection and likely confusion may be found where the marks are identical and the goods commercially related. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010).

Accordingly, the similarity between the marks is a factor that weighs heavily in favor of a finding of likelihood of confusion.

III. Relatedness of the Goods

We now turn to a comparison of the goods under the second *DuPont* factor, keeping in mind that where identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-69 (Fed. Cir. 1993) (“even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001). It is only necessary that there be a “viable relationship between the goods” to support a finding of likelihood of confusion. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009).

In making our determination regarding the relatedness of the goods, we must look to the goods as identified in Applicant's application and the cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *In re Dixie Rest. Inc.*, 41 USPQ2d at 1534; *see also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). “This factor considers whether

‘the consuming public may perceive [the respective goods of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014).

Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration. *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 and thus consumers were likely to purchase the products at the same time and in the same stores). The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

Applicant’s goods are identified as a “surgical system in the nature of a surgical implant for use with the spine composed of artificial materials” and the Registrant’s goods are identified as “dental implants.” The Examining Attorney maintains that the goods are sufficiently similar to cause confusion as to their source. In support of her position, the Examining Attorney made of record webpage excerpts from various websites, i.e., Inion, Elos Medtech, Precipart, and Unity Precision Manufacturing, which, during prosecution, she argued “establish[es] that the same entity commonly

manufacturers, produces, or provides the relevant goods and markets the goods under the same mark.”⁷ The evidence is summarized below:

inion.com:

Inion’s products include biodegradable plates, screws, pins, anchors and bone graft substitutes, all of which are used to enhance the healing of bone or soft tissue injuries, such as those cause by trauma or by reconstructive surgery. Inion’s core expertise is in the design and manufacture of implants from its proprietary Inion® family of biomaterials, which enables the Company to develop medical implants with properties tailored for specific surgical applications, in terms of strength, flexibility and rate of degradation.

The webpage lists Spine Surgery and Dental Surgery as implant application categories.

elosmedtech.com:

Elos Medtech has extensive expertise in the development and design of dental and orthopedic implant products. Our offering includes spine implants – including screws, plates, hooks, connectors etc. – Implants for reconstruction and trauma, and dental implants.

At our Dental and Orthopedic Center of Excellence, our focus is on the key factors that determine implant success – for patients, professionals, and the dental and orthopaedic industry as a whole. Dental and orthopaedic implants are long-term treatments that require precision, strict hygiene control, and effective osseointegration. Our long experience, specialized knowledge and capabilities, and focus on quality ensure that our dental and orthopedic implants support success in these and other areas.

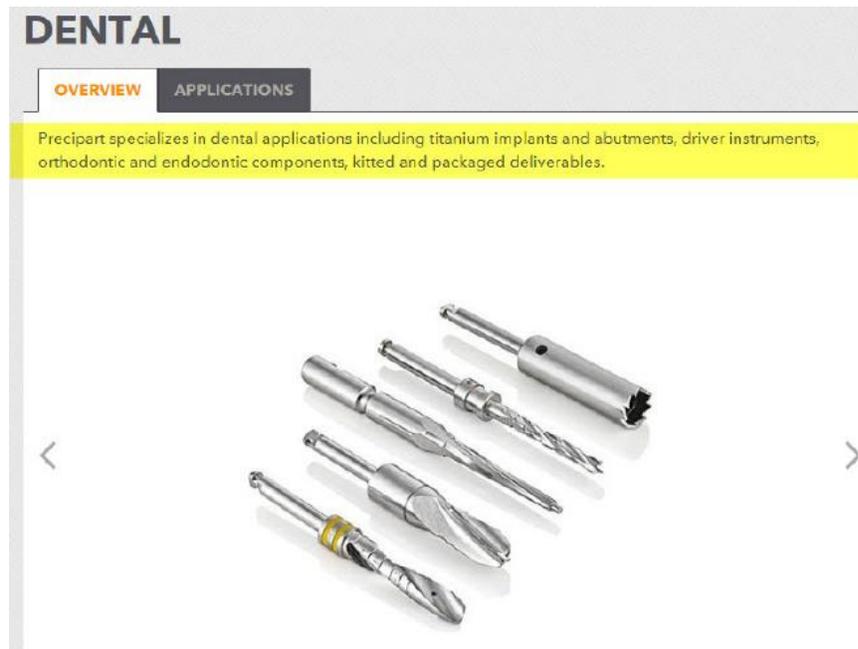
⁷ February 14, 2014 Response to Office Action, TSDR 3. 7-32.

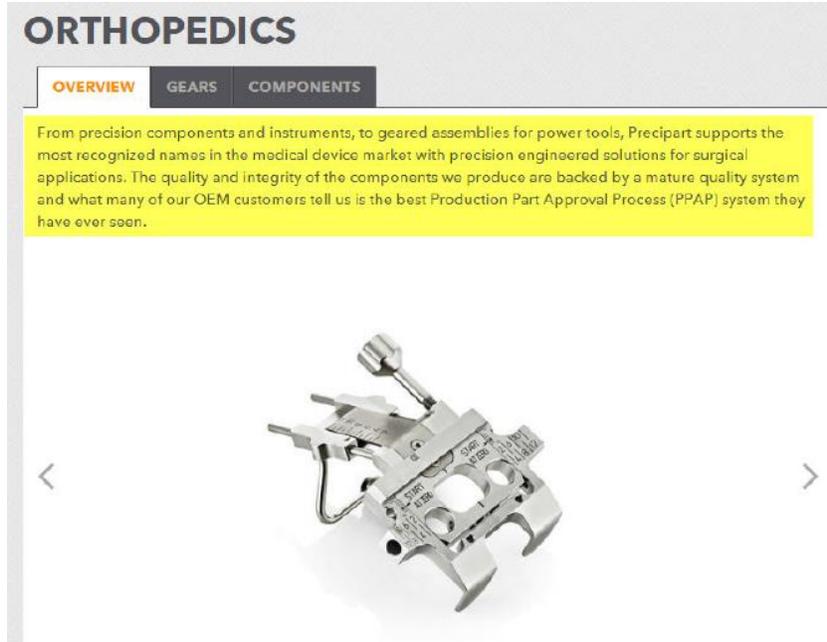
unitytool.com:

Unity Precision Manufacturing has extensive experience manufacturing medical implants, including bone screws, for use all over the human body: spine, wrists, shoulders, hips, fingers, toes, knees and dental.

preciart.com:

Precipart offers both dental and spinal implants as shown in the examples below.





The Examining Attorney also introduced excerpts from the websites of LifeNet Health and Zimmer Bioment showing that they manufacture and produce both spine and dental implants which the record shows are offered through the same trade channels.

lifenethealth.org:

As a full-service tissue bank, our full line of allograft bio-implants provides surgeons with the tools they need to improve the lives of patients. Furthermore, we provide exemplary service to clinicians and hospitals by making the finest quality allograft implants easily accessible. Every year LifeNet Health distributes over 400,000 allograft bio-implants to meet the needs of hospitals and patients around the world.

LifeNet features Allographs for dental procedures and spine implants for cervical, lumbar, and a variety of procedures, for example:

Dental

Allografts for Dental Procedures

Allografts and tissue grafts are generally used for sinus augmentation, maxillofacial reconstruction and correction of periodontal and ridge defects. Our tissue grafts are clinically proven in more applications than any other allografts. As a result, we are the world's most trusted provider of transplant solutions, from new innovations in tissue grafts and technologies to regenerative medicine and cellular therapies. Since 1995, more than 7 million allografts processed using Allowash® technology have been distributed by LifeNet Health with no disease transmission.

A Review of Published Clinical and Pre-clinical Evidence.

Dental	
Structural Grafts	-
Ilium Strip (Bicortical)	
Ribs	
Cancellous Blocks and Cubes	
Cortical Plate	
Soft Tissue-Membranes	+
Demineralized Particulates (DBM)	+
Particulates	+

68-60-073_oregraft_ribs_spec_sheet_11-19.pdf

Description

OreGRAFT® Ribs are used for sinus augmentation, craniofacial reconstruction, and correction of periodontal and ridge defects

- LifeNet Health's patented Allowash XG® technology safely sterilizes allograft tissue
- Can be affixed to surgical site using standard bone screws
- Solid cortical shell with cancellous contained within
- Easy to trim, can be shaped using standard instrumentation

Clinical Application

- Correction of Ridge defects
- Craniofacial reconstruction



Spine

Spine implants for cervical, lumbar, and a variety of procedures.

Spine Implants most often used in spine surgeries and available in many different sizes to fit various applications. Our tissue grafts and spine implants are clinically proven in more applications than any other allograft spine implant provider. As a result, we are the world's most trusted provider of transplant solutions, from new innovations in tissue grafts and spine implants, to regenerative medicine and cellular therapies. Nearly 5 million tissue grafts have been distributed with no disease transmission since the introduction of Allowash XG®. Click the below links to browse our wide portfolio of spine implants and tissue grafts for void/defects.

To download or print our full line of allograft bio-implants [click here](#).



Spine	
Cervical	-
Fibular Wedges	
VertiGraft Fibular Spacer	
VG1® Cervical	
VG2® Cervical	
Cloward Dowel	
Tricortical Cancellous Wedge - Parallel	
Uncortical Cancellous Spacer - Parallel	
VG1® Laminoplasty Spacer	
Iliac Crest Wedge	
Biologics	+
Lumbar	+
Corpectomy	+

68-60-030-01.pdf

Description

Tricortical iliac crest wedge, designed to provide immediate structural support and restore segmental bone loss

- **Osteoconductive:** Natural bone matrix facilitates cell attachment and proliferation, and vascular in-growth
- **Structural:** Tricortical plate provides immediate structural support
- **100% Human Bone:** Can remodel with the patient's own tissue during the healing process
- **Pre-Hydrated:** Allograft bio-implants featuring Preservation® are stored in a fully-hydrated state at ambient temperatures. Preservation eliminates thawing and re-hydration time and does not require freezer storage or compromise the graft's inherent osteoconductive properties¹
- **Sterile:** Sterilized using patented and proprietary Allowash XG® technology which provides a sterility assurance level (SAL) of 10⁻⁶, without compromising the graft's inherent osteoconductive properties²
- **Convenient:** Implant is pre-sized to fit a variety of applications and minimize prep time in the operating room



1. Independent sources include the Virginia Commonwealth University Medical Center and the American Association of Mechanical Engineers. Data of file at LifeNet Health.
2. Eisenlohr LM. "Allograft Tissue Sterilization Using Allowash XG." 2007 Bio-Implants Brief

zimmerbiomet.com:

Zimmer Biomet offers both spinal and dental implants, for example:

ZIMMER BIOMET [Medical Education](#) [Find A Sales Associate](#)



Lineum[®] Occipito-Cervico-Thoracic (OCT) Spine System

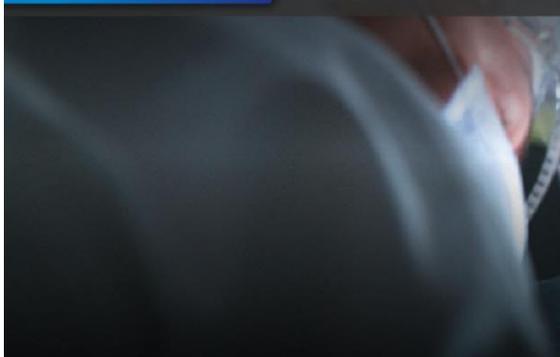
The Lineum OCT Spine System encompasses the Translation[™] Screw, which offers 3.0mm of medial/lateral translation; as well as a broad range of construct options, and intuitive instrumentation to encourage procedural efficiency.

Game-changing Translation Screw

- 3mm of medial/lateral translation encourages optimal screw placement
- Less rod manipulation, easier rod introduction



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Dental Implant Systems

Dental Implant Systems



The Examining Attorney also made of record a third-party registration that covers goods of the types identified in both Applicant’s application and the cited registration.⁸ Third-party registrations that individually cover different goods and that are based on use in commerce serve to suggest that the listed goods are of a type that may emanate from a single source. *See Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The excerpted registration is listed below:

Reg. No./Status	Mark	Pertinent Goods ⁹
3936735 Sec. 71 (6 year) affidavit of use filed and accepted	ENDO BON	Intervertebral spine implants and dental implants

We find the third-party use and registration evidence sufficient to show that Applicant’s surgical implants for use with the spine are commercially related to Registrant’s dental implants, such goods all being medical devices in the nature of implants for surgical applications that consumers may believe emanate from the same source.

⁸ August 17, 2019 Office Action, TSDR 4-6. We have not considered Registration Nos. 4722854 and 5609588 (*id.* at TSDR 12-17) because, as Applicant points out and the Examining Attorney acknowledges, they are not use-based, having been registered under Section 66 or Section 44 of the Trademark Act, 15 U.S.C. § 1141(a) and 15 U.S.C. § 1126(e), respectively, and no Section 71 or Section 8 affidavit has been filed. We also give Registration No. 5228377 (*id.* at TSDR 7-9) for the mark BONEWELDER for, inter alia, “ultrasonic instruments for implanting orthodontic implants and introduction of dental implants” no probative value, because we do not find the goods related to those at issue here on the face of the respective identifications. *In re Thor Tech.*, 90 USPQ2d at 1639 (finding third-party registrations of limited value because goods identified in the registrations were in fields far removed from the involved products).

⁹ We have abbreviated the listing of goods.

Relying on *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003), Applicant argues “[s]ince neither parties’ [sic] identification of goods does not include any of the other companies’ [sic] products, the Examining Attorney must show ‘something more’ than websites from companies that provide a wide variety of products and services.”

Applicant’s reliance on *Azteca* and *Coors* is misplaced. Unlike in those cases where the analysis under the second *DuPont* factor focused on the relationship between goods (food and beverages) on the one hand and services (restaurant services) on the other, here we are comparing goods to goods. “Something more” is only required in the context of comparing goods versus services, not goods versus goods, and where the relationship between the goods and services is obscure or less evident. *See In re St. Helena Hosp.*, 113 USPQ2d at 1087. As explained in the TRADEMARK MANUAL OF EXAMINING PROCEDURE, Section 1207.01(a)(ii) (Oct. 2018) (“Establishing Relatedness of Goods to Services”):

... when the relatedness of the goods and services is not evident, well known, or generally recognized, “something more” than the mere fact that the goods and services are used together must be shown. *In re St. Helena Hosp.*, 774 F.3d at 754, 113 USPQ2d at 1087 (finding that substantial evidence did not support relatedness of hospital-based residential weight and lifestyle program and printed materials dealing with physical activity and fitness). Therefore, when comparing services such as “restaurant services” with less apparently related goods such as “beer,” or “cooking classes” with “kitchen towels,” “something more”—beyond the fact that the goods are used in the provision of the services—must be shown to indicate that

consumers would understand such services and goods to emanate from the same source.

As stated above, we find the third-party use and registration evidence appropriate and probative to establish the commercial relationship between the goods. Moreover, that the third parties manufacture, produce and/or sell goods in addition to the ones highlighted in this decision does not negate the fact that they manufacture and sell goods of the types identified in both Applicant's application and the cited registration. Similarly, whether or not (and it is unclear on this record), as Applicant suggests,¹⁰ the spinal and dental implants are the "principal items" sold by, or the primary business of, the third-party companies does not detract from the probative value of the evidence.

Applicant also questions the probative value of some of the third-party use evidence because the companies have an additional presence outside of the United States.¹¹ For example, while the Inion excerpt indicates that its main office is in Finland, it also references an office in the United States.¹² Similarly, that the sales contact information for Elos Meditech includes multiple employees with phone numbers outside of the United States **in addition to** those with United States numbers does not diminish the probative value of the evidence, as it is clear that the products also are offered to consumers in the United States.¹³

¹⁰ 4 TTABVUE 13-14.

¹¹ *Id.* at 14.

¹² March 10, 2020 Final Office Action, TSDR 8.

¹³ 4 TTABVUE 14; March 10, 2020 Final Office Action, TSDR 10.

Applicant also points to the unpublished decision *In re Johnson & Johnson*, Serial No. 75252479 (TTAB 2002), arguing that the difference in medical devices has been dealt with by the PTO and the courts, and the fact that products are all provided for eventual medical use is not enough to find confusion. While parties may cite to non-precedential decisions, such decisions are not binding on the Board. *In re Constr. Research & Tech. GmbH*, 122 USPQ2d 1583, 1585 n.6 (TTAB 2017) (“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 re Fiat Grp. Mktg. & Corporate Commc’ns S.p.A.*, 109 USPQ2d 1593, 1596 n.6 (TTAB 2014); *In re Procter & Gamble Co.*, 105 USPQ2d 1119, 1121 (TTAB 2012).

Moreover, as is often noted by the Board and the courts, each case must be decided on its own merits. The determination of registrability of a mark in another case does not control the merits in the case now before us. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“[D]ecisions regarding other registrations do not bind either the agency or this court.”); *see also, In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001). The records in each case are different and we further note in that particular case the marks were not identical. On this record, we find Applicant’s spinal implants commercially related to Registrant’s dental implants.

The *DuPont* factor of the relatedness of the goods thus favors a finding of likelihood of confusion.

IV. Relatedness of the Trade Channels

While the respective implants are limited by surgical application, namely spinal vis-à-vis dental, there are no limitations as to channels of trade or classes of purchasers in Applicant's or Registrant's identifications of goods. We therefore must presume that Applicant's and Registrant's goods move, or will move, in all channels of trade usual for these goods. *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“[W]here the likelihood of confusion is asserted with a registered mark, the issue must be resolved on the basis of the goods named in the registration and, in the absence of specific limitations in the registration, on the basis of all normal and usual channels of trade and methods of distribution.”). The evidence of record indicates that both dental and spinal implants are sold by the same manufacturer online through sales representatives to purchasers seeking surgical implants. We accordingly find that the channels of trade are related.

The third *DuPont* factor thus weighs in favor of a finding of likelihood of confusion.

V. Sophistication of the Purchasers

We now address Applicant's argument about the sophistication of the purchasers, which is coupled with its argument regarding the expensive nature of the procedures in which the respective goods are used. Applicant particularly argues that:¹⁴

the commercial world of spinal surgical products and dental implants involve purchases by surgeons, hospital administrators, dentists, and orthodontists in specialized fields with high levels of sophistication with regard to the medical and dental equipment they are involved with. With

¹⁴ 4 TTABVue 18.

regard to Applicant's spinal implants, the choice of these products requires careful thought and one-on-one meetings with Applicant's personnel, who are always available, even during surgery. [internal citations omitted] Spinal surgery instruments and implants are not impulse buys based on the expense involved, the nature of the product itself, and the level of expertise needed by doctors and surgeons.

Applicant goes on to explain that spinal surgery and dental procedures are not likely to be made on impulse; spinal surgery may cost tens of thousands of dollars, while dental implantations range in the thousands of dollars.¹⁵

We agree that the nature of both Applicant's and Registrant's goods leads us to conclude that consumers will exercise care in their purchasing decisions. However, unlike in cases relied upon by Applicant,¹⁶ we do not believe that the degree of care exercised by the consumers in this case rises to a level that would avoid likely confusion. Here, although the record shows that the procedures in which the respective implants are used are costly, there is no evidence as to the price of the implants. Likewise, even if the respective goods are purchased by professionals, including as Applicant asserts, hospital administrators, there could be overlap in the purchasing agents, as the purchasing agents for combined medical/dental facilities may be the same. More importantly, even knowledgeable and careful purchasers can be confused as to source, especially where, as here, identical marks are used in connection with related goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230

¹⁵ *Id.* at 17.

¹⁶ E.g., *Electronic Design & Sales v. Electronic Data Systems*, 21 USPQ2d 1392 (Fed. Cir. 1992); *In re Digirad Corporation*, 45 USPQ 2d 1841 (TTAB 1998) (citing *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F. 2d 1201 (1st Cir. 1983); *Life Technologies, Inc. v. Gibbco Scientific, Inc.*, 826 F.2d 775 (8th Cir. 1987).

USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers ... are not infallible.”)). *See also Refreshment Mach. Inc. v. Reed Indus., Inc.*, 196 USPQ 840, 843 (TTAB 1977) (selling to a sophisticated purchaser does not automatically eliminate the likelihood of confusion because “[i]t must also be shown how the purchasers react to trademarks, how observant and discriminating they are in practice, or that the decision to purchase involves such careful consideration over a long period of time that even subtle differences are likely to result in recognition that different marks are involved”).

We find that the fourth *DuPont* factor favors Applicant.

VI. 13th *DuPont* Factor

Pointing to six coexisting third-party registration pairs, Applicant argues that the United States Patent and Trademark Office (USPTO) “has tended to agree with Applicant regarding the unique differences in dental implants and other surgical implants.”¹⁷ The registration pairs follow:¹⁸

Reg. No.	Mark	Goods/Services	Reg. No.	Mark	Goods/Services
3482551	COMPASS	Intravascular implants	5594707	COMPASS DENTAL (Dental disclaimed)	Dental implant services
1877515	ALLIANCE	Orthopedic implants, namely hip implants	5390240	 alliance	Dental implants

¹⁷ 4 TTABVUE 19.

¹⁸ February 14, 2020 Response; TSDR 45-72. We have abbreviated the listing of some of the goods and services.

Reg. No.	Mark	Goods/Services	Reg. No.	Mark	Goods/Services
5377652	TITAN SPINE (2(f), Spine disclaimed)	Orthopedic spinal implants	4670318	TITAN IMPLANTS	Dental implants
3383262	SPINAL ELEMENTS (Spinal disclaimed)	Spinal fusion implants, orthopedic implants	5582445	ElementZ Hybrid (Supp. Register, Hybrid disclaimed)	Dental implants
4842697	BME ELITE	Staple implants for internal fixation of bone fragments	4678122	ELITE	Dental implants
3803500	MOSAIC	Spinal fusion implants	4635193	MOSAIC	Dental implant surgery
2087777	VITALITY	Orthopedic implants	4191286	VITALITY	Dental implant adjustment kits

These third-party registrations have limited probative value in our decision and cannot justify the registration of another confusingly similar mark, as we do not have sufficient information to determine the facts surrounding their registration. Similarly, the USPTO’s previous approval of Applicant’s earlier-filed application for the mark REFLECT for the same goods at issue here, now abandoned, does not justify allowance of that mark on the present record. While the USPTO strives for consistency, each case must be decided on its own facts and record. *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017) (quoting *In re Boulevard Entm’t*, 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003)). That is, the approval for registration of Applicant’s first application does not

require the approval of a second registration if, on the facts of the case, it would be improper to do so under the governing legal standard. *See id.*; *see also e.g., In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement, including non-genericness, even if the PTO earlier mistakenly registered a similar or identical mark suffering the same defect.”). We are therefore obligated to and have assessed the registrability of Applicant’s mark on its own merits and have carefully considered the arguments and evidence of record in this case.

VII. Conclusion

We conclude that confusion is likely between Applicant’s REFLEX mark for the identified surgical implants for use with the spine composed of artificial materials and the cited REFLEX mark for dental implants. We conclude so principally due to the identical marks, the related nature of the goods, and the relatedness in trade channels, which is not outweighed by any care exercised by sophisticated consumers during the purchasing process.

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