Mailed: December 8, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Globus Medical, Inc.

Serial No. 88676830

Jon A. Schiffrin of Schiffrin & Longo PC,
for Globus Medical, Inc.

Anne M. Farrell, Trademark Examining Attorney, Law Office 118,
Michael W. Baird, Managing Attorney.

Before Wellington, English and Johnson,
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Globus Medical, Inc. ("Applicant") seeks registration on the Principal Register of the standard character mark TRIFECTA for "Implant material comprised principally or completely of human tissue material for use in orthopedic surgery" in International Class 5.[1]

[1] Application Serial No. 88676830; filed November 1, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's claim of a bona fide intent to use the mark in commerce. On November 5, 2019, Applicant filed an amendment to allege use claiming first use of the mark on February 1, 2019 and first use in commerce on February 4, 2019.

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 standard character mark TRIFECTA for "Medical devices, namely, heart valve prostheses" in International Class 10.[2] Applicant appealed the refusal. Both Applicant and the Examining Attorney filed briefs.

We reverse the refusal to register.

I. Analysis

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. DuPont de Nemours & Co*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*") (cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.,* 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co. Inc.,* 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant or for which there is evidence of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019)*; M2 Software, Inc. v. M2 Commc'ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.,* 114 USPQ2d 1232, 1242 (TTAB 2015) ("While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.").

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and goods or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340,

[2] Registration No. 3497151; issued September 2, 2008.

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) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."); *see also In re i.am.symbolic, LLC,* 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) ("The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but 'may focus … on dispositive factors, such as similarity of the marks and relatedness of the goods.'") (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Similarity or Dissimilarity of the Marks

We compare the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP,* 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *DuPont,* 177 USPQ at 567.

There is no dispute that Applicant's and Registrant's marks are identical. Accordingly, the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods

The respective goods need not be identical or competitive for there to be a likelihood of confusion, but the evidence must establish that the goods are related in some manner, or the conditions surrounding their marketing are such, that they could be encountered by the same purchasers under circumstances that could give

rise to the mistaken belief that the goods come from a common source. *Hewlett-Packard Co. v. Packard Press Inc.,* 281 F.3d 1261, 62 USPQ2d 1001, 1003-04 (Fed. Cir. 2002)*; see also In re Rexel, Inc.,* 223 USPQ 830, 831 (TTAB 1984).

The Examining Attorney argues that the "the goods of registrant and applicant are closely related."[3] As her only support for this assertion, the Examining Attorney cites sixteen third-party registrations owned by fourteen entities that purportedly cover both Applicant's and Registrant's goods. Third-party registrations, if they are based on use in commerce, may have probative value to the extent they may serve to suggest that the goods are of a kind that emanate from a common source. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.,* 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Applicant argues that the third-party registrations have limited evidentiary value. We agree.

Three of the third-party registrations issued based on foreign registrations[4] and so are not indicative of whether the goods are the type that emanate from a common source in the United States. *Calypso Tech., Inc. v. Calypso Capital Mgmt.,* 100 USPQ2d 1213, 1221 (TTAB 2011); *In re Mucky Duck Mustard*, 6 USPQ2d at 1470,

[3] Examining Attorney's Brief, 6 TTABVUE 9.

[4] Registration Nos. 5929797 (ARAN BIOMEDICAL), 5929796 (ARAN BIOMEDICAL), and 5552948 (ABCCOLLA). July 6, 2020 Final Office Action, TSDR 19-21, 25-34.

n.6. Two registrations cover goods specific to the dental field,[5] one registration covers goods in the field of orthopedics only,[6] one registration is limited to dental and orthopedic goods,[7] and one registration appears to be for a house mark as the identification of goods is broad, spanning six pages, and the mark consists of the registrant's name and a design.[8] *In re HerbalScience Grp., LLC,* 96 USPQ2d 1321, 1323, n.3 (TTAB 2010) ("Some of the registrations made of record by the examining attorney have little or no probative value because, for example, they are for house marks [.]"). This leaves the following eight registrations, two of which are owned by the same entity:[9]

Reg. No.	Mark	Goods
3870901	aongen	Biological implants, namely, avital processed human or animal connective tissue; … implants consisting of artificial materials; … surgical implants comprising artificial materials.
4980673 4980674	Coloplast COLOPLAST	Implants consisting of biological material, namely, living tissue; … implants consisting of artificial material.

[5] Registration No. 4273145 (SMARTER THINKING. SIMPLIER DESIGN) and Registration No. 5944683 (for the design mark). December 13, 2019 Office Action, TSDR 17-18; July 6, 2020 Final Office Action, TSDR 22-24. Some of the goods covered by Registration No. 4273145 are not specifically limited to the dental field, but most of them are and the registration is owned by Keystone Dental, Inc. supporting an inference that the goods are dental products.

[6] Registration No. 3240328 (DEPUY SPINE). July 6, 2020 Final Office Action, TSDR 8-9.

[7] Registration No. 3868433 (EXACTECH). July 6, 2020 Final Office Action, TSDR 5-7.

[8] Registration No. 4258224 for the mark META BIOMED owned by Meta Biomed Co., Ltd. December 13, 2019 Office Action, TSDR 9-15.

[9] December 13, 2019 Office Action, TSDR 6-8, 19-28; July 6, 2020 Final Office Action, TSDR 10-18, 35-37.

Reg. No.	Mark	Goods
4970455	SeaSpine	Biological bone tissue intended for subsequent implantation; human allograft bone tissue; implants comprising living tissue; surgical implants comprising living tissue … surgical implants comprising artificial material.
5433787	XTANT	Human allograft tissue; Biological implants, namely, a vital processed human or animal connective tissue.
5822284	CARTIJET	Biological products, namely biological tissue in the nature of bone tissue for subsequent implantation; … implants and their parts made of artificial materials.
6004314	ALL IN ONE FIXATION SYSTEM	Bone substitute material, namely, biological implant material for filling bone defects as well as for the localized treatment of bone and soft tissue infections … surgical implants comprising artificial material.
4806739	CERAFIX	Medical devices, namely, nanofiber-based implantable vascular and cardiovascular devices …. Surgical and medical instruments, namely, surgical mesh prosthesis comprised primarily of living tissue for …orthopedic surgery.

Only the last registration, for the mark CERAFIX, covers implants for both orthopedic and cardiovascular use. Still, the Examining Attorney argues that the registrations are probative of relatedness because "implants consisting of artificial material" or "similar wording" in the cited registrations "encompasses registrant's heart valve prostheses."[10] Similarly, the registrations identifying biological implants consisting of tissue are broad enough to encompass Applicant's goods. These descriptions, however, are so broad that we cannot ascertain from the face of the

[10] Examining Attorney's Brief, 6 TTABVUE 9.

registrations whether the identified goods are, in fact, the same or similar to Registrant's and Applicant's goods. That is, any number of artificial and biological implants could be covered by such descriptions. At best, the registrations suggest the mere possibility that Applicant's and Registrant's goods may emanate from a common source. Accordingly, we find that the cited registrations, with the exception of the registration for CERAFIX, have limited probative value.

One registration covering goods similar to both Applicant and Registrant is not a sufficient basis for finding the goods related. Moreover, while both Applicant's and Registrant's goods are medical devices to be implanted into a patient's body during surgery, "the issue of whether or not two products are related does not revolve around the question of whether a term can be used that describes them both, or whether both can be classified under the same general category." *Electronic Data Sys. Corp. v. EDSA Micro Corp.,* 23 USPQ2d 1460, 1463 (TTAB 1992).

Applicant's and Registrant's marks identify different medical products, for use in complex surgery in distinct medical specialties (orthopedic surgery v. heart surgery). The evidence does not support a finding that these are the types of goods that emanate from a common source. Accordingly, the second *DuPont* factor weighs against a finding of likely confusion.

C. Similarity or Dissimilarity of the Trade Channels and Classes of Consumers

The Examining Attorney argues that Applicant's and Registrant's goods "travel in the same unrestricted channels of trade,"[11] but trade channel restrictions are inherent in the nature of the goods, which are specified for use in different medical procedures. Applicant's implants for orthopedic surgery are necessarily marketed to orthopedic surgeons[12] while the consumers of Registrant's heart valve prostheses are heart surgeons. There is no evidence that it is common for the same doctors to perform orthopedic and heart surgery, nor would this be likely given the highly technical nature of such surgical procedures and the differences between the medical specialties. Moreover, the mere fact that goods might be bought by the same medical institutions "does not, by itself, establish similarity of trade channels or overlap of customers." *Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.,* 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992) ("The likelihood of confusion must be shown to exist not in a purchasing *institution*, but in 'a customer or purchaser.'") (quoting *Astra Pharm. Prods., Inc. v. Beckaman Instruments, Inc.,* 718 F.2d 1201, 220 USPQ 786, 790 (1st Cir. 1983)).

For these reasons, the third *DuPont* factor supports that confusion is unlikely.

[11] Examining Attorney's Brief, 6 TTABVUE 11.

[12] June 5, 2020 Office Action Response, TSDR 19, Declaration of Allison Adams, Applicant's Group Engineering Manager, Biomaterials, ¶ 7.

D. Sophistication of the Purchasers and Conditions of Sale

The sophistication of the purchasers and the circumstances under which Applicant's and Registrant's goods are purchased and used further supports a finding that confusion is unlikely. Applicant submitted the declaration of Allison Adams, its Group Engineering Manager, Biomaterials, who avers that:

> (1) Applicant's goods are "created from human tissue and are generally part of a system comprising complex surgical instrumentation that would require the sophisticated skill and experience of orthopedic and spine surgeons in order to be used";
>
> (2) "A spine surgeon who is about to perform a spinal surgery using Globus' products will be accompanied during the surgery by a Globus representative, who remains available during the surgery for technical support";
>
> (3) "Surgeons and hospital administrators who would meet with a Globus representative are highly trained and educated in the field of surgical instrumentation and spinal surgery"; and
>
> (4) Applicant's "medical goods are highly regulated" by the Food and Drug and Administration ("FDA") and "are not interchangeable with any other product."[13]

Registrant's heart valve prostheses similarly are subject to FDA approval and regulation[14] and are purchased and used by surgeons who are highly trained and educated in the field of heart surgery as well as in heart valve prostheses.[15]

In sum, the surgeons purchasing both Applicant's and Registrant's products are sophisticated consumers likely to make a purchase only after careful consideration

[13] *Id.* at TSDR 19-20, Adams Declaration, ¶¶ 5, 8, 9, 10.

[14] *Id.* at TSDR 21-22, FDA Premarket Approval of Registrant's TRIFECTA heart valve prostheses.

[15] *Id.* at TSDR 24-37 (detailed user manual for Registrant's heart valve prostheses).

and deliberation. *Warner-Hudnut, Inc. v. Wander Co.*, 280 F.2d 435, 126 USPQ 411, 412 (CCPA 1960) (finding that physicians are "a highly intelligent and discriminating public"); *In re Digirad Corp.,* 45 USPQ2d 1841, 1844 (TTAB 1998) ("the sophistication of th[e] purchasers [and] the care with which the products are purchased … mitigate against a finding that the goods … are related, despite the fact that both x-ray imaging and nuclear imaging are medical diagnostic technologies"). Accordingly, the fourth *DuPont* factor weighs in Applicant's favor.

II. Conclusion

On this record, we find that Applicant's mark is unlikely to cause confusion with Registrant's mark because of the differences between the goods, trade channels and classes of consumers, as well as the sophistication of the relevant purchasers.

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